Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MATTHEW CATE, DIRECTOR OF CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *Petitioner,*

v.

MOHAMMED HAROON ALI, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

On federal habeas review of a claim pursuant to *Batson* v. *Kentucky*, 476 U.S. 79 (1986), did the Ninth Circuit fail to comply with the deferential standard of review required by 28 U.S.C. § 2254 when it disregarded the trial court's factual finding that the prosecutor's reasons for exercising peremptory challenges were genuine, in favor of its own de novo comparative juror analysis?

LIST OF PARTIES

Director Matthew Cate of the California Department of Corrections and Rehabilitation succeeded the respondent in the federal district court and court of appeals, Roderick Q. Hickman, who has retired.

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CONSTITUTIONAL PROVISIONS

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Matthew Cate, Director of the California Department of Corrections and Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1), reversing the district court's denial of respondent's petition for writ of habeas corpus, is reported at 584 F.3d 1174 (9th Cir. 2009).

The orders and opinions of the United States District Court for the Northern District of California (Pet. App. 42), the California Court of Appeal (Pet. App. 94), and the California Supreme Court (Pet. App. 115), are unreported.

STATEMENT OF JURISDICTION

The opinion of the court of appeals was filed on July 7, 2009. The court of appeals amended the opinion and denied petitioner's timely-filed petition for panel rehearing and rehearing en banc on October 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section One of the Fourteenth Amendment of the United States Constitution states, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and

Effective Death Penalty Act (AEDPA), provides in part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

1. In 1999, respondent—a probationer and native of Fiji facing deportation for a prior kidnapping conviction—strangled his girlfriend, Tracey Biletnikoff, after she refused to lend him her car so that he could obtain drugs. Respondent dumped her body on a hillside, fled to Mexico, and later was apprehended trying to reenter this country. He initially denied killing the victim, but subsequently confessed. Pet. App. 95-100.

2. During jury selection at respondent's trial for first-degree murder in 2001, his defense counsel

objected, pursuant to *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to the prosecutor's peremptory challenges of two black venire members: M.C., a female public school employee, and D.J., a male software designer. The trial court found no prima facie showing of racial discrimination when the prosecutor challenged M.C., but asked the prosecutor to justify the two strikes after D.J. was challenged late in the four-day jury selection process. SER 530, 789.[1]

The prosecutor gave three reasons for challenging M.C. First, the prosecutor explained that M.C.'s family had been involved in the criminal justice system as a result of her stepson's prosecution for molesting her daughter, and that she equivocated about whether that involvement would affect her judgment. SER 790. In jury voir dire, when the trial court asked M.C. how "that incident and all of its ramifications, going to court and all of that, might influence you in this case," M.C. had replied, "I really don't think—I don't think it would have any bearing. I don't know. I don't think it would." SER 252. Subsequently, the trial court asked, "Would there be any lasting effect on either the defense or the prosecution in this case as a result of your experiences or knowledge about that?" M.C. replied, "No." SER 253. The prosecutor later asked M.C. whether "that prior experience would play into your decision-making process today," and she replied, "I'm not sure. The thoughts are there, the memories are there. But it's been a while, and the person that I reference is no longer—is now deceased. So I don't think that it would." SER 455.

Second, the prosecutor cited M.C.'s voir dire answers and her "very emphatic" demeanor suggesting that her judgment would be affected if, in her opinion, the attorneys were not sufficiently professional and respectful during trial. SER 790-791. During voir dire, defense counsel had asked M.C. how she would feel if he aggressively cross-

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[1] "SER" refers to the Supplemental Excerpt of Record filed by petitioner in the court of appeals.

examined witnesses. M.C. replied, "Well, I believe that as long as you don't cross the line of being disrespectful and still keep it in a professional manner." She agreed with defense counsel that she would not penalize the attorneys for aggressive advocacy, "as long as [they] do it in a respectful, professional manner." SER 399-400. She also agreed with the prosecutor that it was "important" to her that the attorneys conduct themselves in a professional and respectful manner. SER 456.

Third, the prosecutor cited M.C.'s hesitation in answering whether her religion would make it hard for her to sit in judgment of others. SER 791-792. When asked during voir dire if anything about her spiritual practice would prevent her from judging other people, M.C. had said no—but defense counsel then pointed out to her that she had hesitated before answering and, accordingly, questioned her further before receiving a final response. SER 400.

The prosecutor explained that the "combination of these factors gave me good reasons to be concerned about her ability to fairly and impartially do it, and I exercised a peremptory challenge for that reason and for that reason alone." SER 792.

Next, the prosecutor gave four reasons for challenging D.J. The juror indicated that he would be unable to avoid making decisions about the case until the end of trial. He answered a voir dire question in a flippant way that provoked laughter at the prosecutor's expense. He had assisted his brother, an appellate defense attorney, in preparing for argument before the Supreme Court in two criminal cases. And his "lighthearted banter" with the trial court "reflected a casualness that was not typical of jurors." The prosecutor said he had initially thought D.J. would be an excellent juror, but "[t]hat combination of things caused me to change my mind. Race had nothing to do with either of these things." SER 792-797.

The trial court repeatedly questioned the prosecutor during his recitation of reasons for the peremptory challenges. SER 790, 793, 794, 795, 796, 797. The court allowed defense counsel to respond

and also questioned defense counsel. SER 799, 800. Defense counsel never suggested that the prosecutor's challenges were suspicious because M.C. or D.J. were similar to any identified non-minority venire person whom the prosecutor had refrained from challenging. Nor did counsel ask the court to identify any such jurors itself for such comparison purposes. SER 797-801, 809-810. The prosecutor noted that the question was not whether his reaction to the jurors' comments was wrong or right, "as long as that is the basis for my decision, whether it makes sense or not. The question is, [a]m I not being candid with the Court in saying those are my decisions?" SER 801.

The court took the matter under submission. Overnight the court asked the court reporter to prepare a transcript of the prosecutor's interchange with D.J., and the court also reviewed M.C.'s and D.J.'s juror questionnaires and hardship requests. The next day, the court denied the *Batson* motion. It recognized the right of both parties to exercise peremptory challenges against jurors whom they "honestly" feel cannot be fair and impartial. The court also noted that the prosecutor had excused a white prospective juror who, like D.J., was arguably too "independent minded." SER 809-812.

The jury convicted respondent of first degree murder, rejecting his defense that he killed without premeditation and in the heat of passion. The court sentenced respondent to prison for 55 years to life. Pet. App. 94.

3. The California Court of Appeal rejected respondent's *Batson* challenge, and other claims of error, on direct appeal and habeas corpus. Invoking *Miller-El* v. *Cockrell*, 537 U.S. 322, 338-39 (2003), the appellate court undertook an examination of the "persuasiveness of the prosecutor's justifications," which "largely turns on an evaluation of whether the prosecutor's facially race-neutral justifications are credible." Pet. App. 107-108. Citing *Batson*, 476 U.S. at 98 n. 21, *Miller-El I*, 537 U.S. at 339-40, and *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991), the appellate court noted that the trial court's factual

finding of the absence of discriminatory intent was entitled to great deference. Pet. App. 108. Pointing out that the trial court had "closely questioned the prosecutor and weighed the proffered explanations under correct standards," the appellate court found that substantial evidence supported the trial court's finding of no discriminatory intent by the prosecutor, and that the "jury selection process was not marred by purposeful discrimination." Pet. App. 104.

The state appellate court rejected respondent's argument that M.C.'s later less-equivocal statements overcame the inference the prosecutor had drawn from her hesitance in answering whether her religious beliefs and her prior contact with the criminal justice system would influence her as a juror. The court observed that "attorneys are entitled to exercise peremptory challenges based upon a prospective juror's first, unguarded responses to questioning, and discriminatory intent cannot be inferred from an attorney's reluctance to credit later responses." Pet. App. 110. As to D.J., the appellate court concluded that the prosecutor could fairly consider a prospective juror's attitude and intellectual proclivities in exercising a peremptory challenge, and noted that the prosecutor excused a white prospective juror who, like D.J., appeared well qualified but was also "independent minded." Pet. App. 110.

The appellate court declined to conduct further "comparative analysis" of jurors challenged by the prosecutor versus those not challenged by him, because state law precluded a reviewing court from attempting such analysis for the first time on appeal, and because respondent's counsel had made only general references to other jurors at the *Batson* hearing. Pet. App. 110 n. 6 (citing *People* v. *Johnson*, 30 Cal. 4th 1302, 1325, 71 P.3d 270, 285 (2003)). In 2004, the California Supreme Court denied further review. Pet. App. 115.

4. In 2005, respondent filed a federal habeas corpus petition under 28 U.S.C. § 2254. In an order filed in 2007, Judge Phyllis J. Hamilton decided that, pursuant to *Kesser* v. *Cambra*, 465 F.3d 351 (9th Cir.

2006) (en banc), California's rule that comparative juror analysis need not be undertaken for the first time on appeal was unreasonable under *Miller-El* v. *Dretke*, 545 U.S. 231 (2005). *Kesser* had deemed comparative juror analysis to be "clearly established Federal law"under § 2254(d) as of 1992 because *Miller-El II* had employed such an analysis in a habeas case in which the underlying state judgment had become final that year. Pet. App. 55-63. Accordingly, the district court reviewed respondent's *Batson* claim de novo, by conducting its own comparative jury analysis. Pet. App. 63-69. That comparative analysis revealed only "minor faults" in the prosecutor's reasoning, not racial bias. Concluding that the evidence of discrimination "pales in comparison" to that in *Miller-El II* and *Kesser*, the district court denied the *Batson* claim. Pet. App. 69-70.

5. A Ninth Circuit panel reversed and ordered the writ to issue on the *Batson* claim. Stating that it was applying 28 U.S.C. § 2254(d)(2), which prescribes deferential review of state-court fact-finding, the panel opined that the state court's finding that the prosecutor had not engaged in racial discrimination in striking juror M.C. was incorrect, "objectively unreasonable," and refuted by "clear and convincing evidence" to the contrary. Pet. App. 14. The panel, similarly, found the district judge's contrary finding to be "clearly erroneous." Pet. App. 12-13 n. 6. Further—although leaving undisturbed the earlier state-court and federal-court findings that the prosecutor had acted properly in dismissing juror D.J.—the panel nonetheless reasoned that the "weak" nature of some of the prosecutor's reasons for striking D.J. supported the panel's determination that the prosecutor's asserted neutral reasons for striking M.C. were in reality mere pretexts for discrimination. Pet. App. 39-40.

The Ninth Circuit reached its conclusion primarily via its own extensive comparative analysis of challenged and unchallenged jurors. The court of appeals did not evaluate the trial court's credibility finding in its opinion. It noted only that, in denying

the *Batson* motion, "the trial court did not consider comparative evidence regarding the responses of M.C. and [D.J.] and the responses of non-African American members of the jury pool during the jury selection process." Pet. App. 8-9.

As the Ninth Circuit viewed it, the prosecutor's professed concern about M.C.'s earlier involvement with the criminal justice system, and the juror's equivocation about whether that experience would affect her judgment, were "pretextual make-weights." Pet. App. 19. The prosecutor, the court of appeals asserted, did not excuse white jurors who also had experienced domestic violence and given equivocal responses about how it might affect their impartiality. In contrast, finding the juror was insufficiently similar to M.C., the court of appeals discounted the fact that the prosecutor had struck another prospective juror whose son had molested his daughter. Pet. App. 24-25. The panel concluded, "This comparative analysis therefore leads to only one reasonable conclusion: the prosecutor's asserted concern about objectivity was not an actual reason for his decision to strike M.C., but was pretext." Pet. App. 27.

The Ninth Circuit also rejected the prosecutor's reliance on M.C.'s suggestion that a perceived lack of professionalism by the attorneys would affect her judgment. It found that M.C's "expectations were reasonable" and that she actually had not made such a statement—even though the juror had said she would not penalize the attorneys only as long as they did not, in her assessment, "cross the line of being disrespectful." The court of appeals also relied on its view that another non-minority juror had stated that he expected similar professionalism but was not challenged by the prosecutor. Pet. App. 31.

Further, the Ninth Circuit rejected the prosecutor's reliance on juror M.C.'s hesitation about whether her religion would allow her to sit in judgment. It found that M.C. did not actually say her religion would make it difficult to judge, although it did not dispute that the record supported the prosecutor's claim that she had hesitated before

answering the question. The court of appeals also found that a non-minority juror whom the prosecutor also had challenged was not comparable, and that yet another assertedly similar juror whom the prosecutor challenged had given more equivocal answers than M.C. on the issue. Pet. App. 32-36. The Ninth Circuit thus concluded that its "comparison of M.C. to other potential and actual jurors convincingly refutes each of the prosecutor's non-racial justifications for his peremptory challenge of M.C." Pet. App. 36.

Finally, recognizing that the prosecutor's concern about D.J.'s bad attitude and connection to a criminal defense attorney appeared "credible," the court of appeals stated that it might well have affirmed the judgment if D.J. had been the only black juror excused by the prosecutor. However, in light of the explanations for striking M.C., the court decided that two allegedly questionable reasons the prosecutor gave for striking D.J.—that he was concerned D.J. would not wait to decide the case until the end of trial and that D.J. was unusually casual—took on additional significance and supported its conclusion that the prosecutor's actual reason for striking M.C. was race-based. Pet. App. 40-41.

6. On October 23, 2009, the court of appeals denied panel rehearing and rehearing en banc. Pet. App. 2. On October 30, the court of appeals stayed its mandate pending the filing of this petition.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's approach to *Batson* claims improperly disregards the credibility determination made by the state trial judge who witnessed the voir dire and questioned the prosecutor face to face, and instead indefensibly elevates "comparative juror analysis" of the cold written record years after trial as the primary method of assessing the prosecutor's credibility. The erroneous product of such an approach is the substitution of tendentious and debatable inferences drawn by the remote federal appellate court in place of the on-the-scene factual

determination made by the judicial officer in the best position to make the most reliable call.

This Court has made clear that the trial court's conclusion about the prosecutor's demeanor is the "best evidence" on the issue of discriminatory intent. *Snyder* v. *Louisiana*, 552 U.S. 472, 128 S. Ct. 1203, 1208 (2008). The Ninth Circuit's failure to accord any deference to the trial court's conclusion on the ultimate factual issue of the honesty of the prosecutor contravenes this Court's recognition of the preeminence of the trial court's finding on the *Batson* claim. Further, it circumvents additional restrictions, imposed by Congress, on second-guessing state court fact-finding in federal habeas corpus proceedings where finality and comity concerns count as strong additional reasons for deferring to the state court judge. See 28 U.S.C. § 2254(d)(2), (e)(1). As this Court emphasized in *Rice* v. *Collins*, 546 U.S. 333, 341-342 (2006), where it rejected the Ninth Circuit's grant of the writ on a *Batson* claim, "Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination." Here, in reaching a result contrary to *Collins*, the Ninth Circit never even mentioned this Court's decision in that case.

This Court has recognized, moreover, that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial," *Snyder* v. *Louisiana*, 128 S. Ct. at 1211, and that "a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations," *Miller-El I*, 537 U.S. at 339. The particular weakness of the comparative analysis here is illustrated by the fact that the court of appeals compared challenged minority jurors to selected non-minority jurors whose voir dire did not even merit comment at the *Batson* hearing. More troubling, the Ninth Circuit's comparative analysis was based wholly on the appellate court's idiosyncratic view of who might be a similarly situated juror and what weight to assign

sometimes vague or conflicting answers of the designated similar juror. It is untenable to believe that such comparisons, mined from self-selected portions of jury voir dire years after the trial, could prove compelling enough to supplant a contrary finding, otherwise supported by the record, by the state judge who presided over the voir dire and observed the main witness face to face. It is even less tolerable that a federal habeas court may cast aside a trial court's *Batson* credibility finding on a basis as weak as that of comparative juror analysis, especially when the analysis is performed for the first time years after the fact. The grant of the writ on race-discrimination grounds in such circumstances gravely impugns the reputation of the prosecutor who never receives a fair opportunity to address the comparisons and defend himself.

The systemic problem manifested by the Ninth Circuit's opinions in cases such as *Collins* and this one may be ascribed to the Circuit's erroneous perception that a rule requiring comparative juror analysis became "clearly established Federal law," for purposes of 28 U.S.C. § 2254(d), under this Court's precedents as of 1992. According to the Ninth Circuit, post-1992 criminal judgments resting on state court fact-finding crediting the prosecutor's race-neutral explanation for jury strikes under *Batson* will be subject to dismissal as unreasonable unless the state court engaged in comparative analysis to the federal habeas court's liking. That view, however, runs afoul of this Court's strict interpretation of "clearly established Federal law" under § 2254(d). By backdating an asserted requirement of comparative juror analysis, the Ninth Circuit has established a methodology that improperly allows the federal habeas court to set itself up as the sole arbiter of the prosecutor's credibility—without ever examining the prosecutor or, for that matter, without ever seeing the prospective jurors deemed similar to the challenged minority jurors.

Here, the prosecutor offered logical race-neutral reasons, supported by the record, for his peremptory challenge of juror M.C. The trial court then went

above and beyond the requirements of *Batson* in assessing the prosecutor's credibility. It closely questioned both the prosecutor and defense counsel, and reviewed the challenged jurors' questionnaires, hardship excuses, and a transcript of the relevant voir dire. And, in fact, it compared one of the challenged jurors to a similarly situated juror, even though not requested to do so by defense counsel. It is hard to imagine how a trial court could better "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" See *Batson*, 476 U.S. at 93. The Ninth Circuit's opinion is not merely aberrant in light of the record, it is in profound conflict with AEDPA and with the *Batson* jurisprudence of this Court.

A. The Ninth Circuit Violated *Batson* And AEDPA By Substituting Its Own Inferences Drawn From "Comparative Juror Analysis" For The Trial Judge's Credibility Finding

1. This Court has repeatedly held that reviewing courts must defer to the trial court's factual finding that the prosecutor's reasons for exercising peremptory challenges were genuine. In *Batson* itself, the Court stated, "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98 n. 21.

In *Hernandez* v. *New York*, 500 U.S. 352 (plurality opinion), the Court reaffirmed that "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Id.* at 364. The Court explained:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding "largely will turn on evaluation of credibility." In

> the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Id. at 365 (citations omitted).

In *Miller-El* v. *Cockrell*, 537 U.S. 322, the Court held that "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. . . . [T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id.* at 338-39. "Deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations." *Id.* at 339.

Most recently, in *Snyder* v. *Louisiana*, 128 S. Ct. 1203, the Court reaffirmed that "[t]he trial court has a pivotal role in evaluating *Batson* claims." *Id.* at 1208. The Court summarized this role as follows:

> Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge. In addition, race-neutral reasons for peremptory challenges often

> invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province, and we have stated that in the absence of exceptional circumstances, we would defer to the trial court.

Id. (citations, brackets, and internal quotes omitted).

In addition, the Court has accorded particular deference to credibility findings generally. In *Anderson* v. *Bessemer City*, 470 U.S. 564, 575 (1985), the Court observed that factual findings based on determinations regarding the credibility of witnesses demand even greater deference than other kinds of factual findings, because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." In *Marshall* v. *Lonberger*, 459 U.S. 422, 433-34 (1983), the Court emphasized that credibility findings are especially insulated on habeas review by federal courts, which have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." See also *Concrete Pipe & Prods. of Cal. Inc.* v. *Constr. Laborers Pension Trust*, 508 U.S. 602, 623 (1993) ("the factfinder is in a better position to make judgments about the reliability of some forms of evidence than a reviewing body acting solely on the basis of a written record of that evidence. Evaluation of the credibility of a live witness is the most obvious example.").

2. The Ninth Circuit, however, ignored the trial court's credibility finding in this case. It is true that,

in setting forth the "*Batson* framework," the Ninth Circuit said a "finding of intentional discrimination is a finding of fact entitled to appropriate deference by a reviewing court." Pet. App. 11 (quoting *Batson*, 476 U.S. at 98 n. 21). But no further mention of that standard appears in its 41-page opinion. Nor did the court of appeals discuss the trial court's considered conclusion that the prosecutor's justifications were genuine.[2] As this Court has repeatedly explained, the reason for this extraordinary deference is because the question involves a credibility determination and the "best evidence" of the answer is usually the prosecutor's demeanor. See *Snyder* v. *Louisiana*, 128 S. Ct. at 1208. The Ninth Circuit only paid lip service to this standard, discarding it altogether for the remainder of its analysis, in violation of the principle that the trial court's credibility determination is the "pivotal" finding at issue. See *id.*

2. The Ninth Circuit's approach also violates both general and specific principles of federal habeas review. As a general matter, this Court has made

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[2] The Ninth Circuit's sole reference to the trial court's inquiry was to note that the trial court had questioned whether D.J.'s willingness to reevaluate his position was evidence of close-mindedness, which the Ninth Circuit found supported its conclusion that this justification was "dubious." Pet. App. 38. However, the Ninth Circuit neglected to acknowledge the entire record on this point. The trial court stated, "it's natural for someone who is hearing things in piecemeal to have impressions of senses or make judgments as things go on and then change them back and forth." The prosecutor responded, "[W]hat you just said, Your Honor, may be an extremely reasonable and fair approach. Those weren't the terms he used, in my evaluation, having cause for concern about that." SER 796-797. When defense counsel subsequently asserted that he had been "impressed" by D.J.'s comments about the process for making up his mind, the trial court observed, "But you were concerned about it because you explored it some more. You didn't just hear the answer and then leave it. You continued on [] as if it were something he ought not to be doing." SER 799.

clear that the purpose of AEDPA is "to ensure that state-court convictions are given effect to the extent possible under law." *Bell* v. *Cone*, 535 U.S. 685, 693 (2002). This "demands that state court decisions be given the benefit of the doubt." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). The Ninth Circuit took the opposite tack in this case, combing the record eight years after trial to unearth any word or phrase that could possibly constitute grounds for finding that the prosecutor's reasons were pretextual, and then construing all such responses against the prosecutor and the finding of the trial court.[3] The Ninth Circuit's disregard of the state court proceedings cannot be reconciled with the requirement of deference to state court opinions

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[3] For example, when M.C. was asked how she would feel if defense counsel had to aggressively cross-examine witnesses, she stated, "Well, I believe that as long as you don't cross the line of being disrespectful and still keep it in a professional manner." She also agreed with defense counsel that she would not penalize the attorneys for aggressive advocacy, "as long as we do it in a respectful, professional manner." SER 399-400. In the Ninth Circuit's view, M.C. "did *not* say, as the prosecutor stated during the *Wheeler/Batson* hearing, that unprofessional conduct or aggressive cross-examination would 'affect her judgment.' [] Instead, she said the opposite—that she would *not* penalize the attorneys for aggressively advocating on behalf of their clients." Pet. App. 30-31. The Ninth Circuit therefore concluded that the prosecutor had "mischaracteriz[ed]" M.C.'s testimony, which therefore showed "evidence of discriminatory pretext." Pet. App. 31. However, it was clear that M.C. in fact had established a "line" in her own mind for what constituted sufficiently respectful advocacy, and that she would penalize the attorneys if they crossed that line. Only an antagonistic reading of the record supports a conclusion that the prosecutor deliberately misstated M.C.'s response in order to conceal a racial motivation for the peremptory challenge. See *Rice* v. *Collins*, 546 U.S. at 340 ("Seizing on what can plausibly be viewed as an innocent transposition makes little headway toward the conclusion that the prosecutor's explanation was clearly not credible.")

under 28 U.S.C. § 2254. Whether a trial court's third-step *Batson* determination is reviewed under 28 U.S.C. § 2254(d)(2) or (e)(1), it cannot be cast aside simply because the trial court did not conduct exacting after-the-fact comparisons of the kind available to a federal habeas court with the luxuries of time, written briefs, and complete voir dire transcripts. Rather, to warrant habeas relief, either the trial court's determination of the facts must be objectively unreasonable under (d)(2), or its presumptively correct factual finding must be rebutted by clear and convincing evidence under (e)(1).[4]

3. The Ninth Circuit's error in this case cannot be reconciled with *Rice* v. *Collins*, 546 U.S. 333. In terms that dictate why the court of appeals' decision in this case also should be reversed, this Court in *Collins* held that the Ninth Circuit's attempt to override the state court's fact finding "misappl[ied] settled rules that limit its role and authority." *Id.* at 335. The Court explained that the Ninth Circuit's "attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Id.* at 342; see *Wood v. Allen*, 2010 U.S. LEXIS 763, *20 (Jan. 20, 2010) ("a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance"). Here,

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[4] The Court has declined to address whether AEDPA review of a third-stage *Batson* claim falls under 28 U.S.C. § 2254(d)(2) or (e)(1) or both. *Collins*, 546 U.S. at 338-39; see *Miller-El II*, 545 U.S. at 240, 265-66 (holding that petitioner had shown by clear and convincing evidence that the finding of no racial discrimination was wrong, the standard under § 2254(e)(1), and also that the state court's conclusion was unreasonable, the standard under § 2254(d)(2)). The Court has treated the matter as a presumptively correct factual finding in pre-AEDPA cases. See *Purkett* v. *Elem*, 514 U.S. 765, 769 (1995) (*per curiam*), *Hernandez* v. *New York*, 500 U.S. at 366.

Ninth Circuit again has overturned a California court's *Batson* credibility finding with respect to a prosecutor whom the appellate court never saw, and did so on the flimsy basis of merely debatable inferences the panel chose to draw from an after-the-fact reading of the cold written record—including comparative analysis of voir dire by jurors whom the appellate court never saw either.

The Ninth Circuit error in this case was even more egregious than it was in *Collins*. In *Collins*, the prosecutor's stated reasons were not supported by the record in some signicant respects, and she otherwise acknowledged that she might have been seeking balance on the jury among certain groups. Here, in contrast, the prosecutor's reasons all were supported by the record, and all of them were clearly race-neutral on their face. Further, the Ninth Circuit granted *Batson*-based relief in this case without so much as mentioning this Court's controlling opinion in *Collins*.

4. Given the inherent weakness of employing comparative analysis for the first time on habeas review, it will override the trial court's factual finding and satisfy the onerous burden justifying relief under § 2254(d) only in "exceptional circumstances." *Snyder*, 128 S. Ct. at 1208 (quoting *Hernandez*, 500 U.S. at 366). Where the prosecutor's stated reasons are race-neutral, and where they are supported by the record, remote comparative analysis of a few jurors alone can hardly demonstrate that the judge's credibility call was either "objectively unreasonable" or controverted by "clear and convincing evidence." Instead, it will at most give rise to the merely "debatable" alternative inferences that this Court in *Collins* recognized are insufficient to support habeas corpus relief.

The Court made this exacting standard clear in the two cases where it found *Batson* error. In *Miller-El* v. *Dretke*, 545 U.S. 231, the prosecutor exercised a peremptory challenge against prospective juror Fields on the ground that he would impose the death penalty only if he thought the defendant could not be rehabilitated. However, Fields had unequivocally

stated that he *could* impose the death penalty regardless of the possibility of rehabilitation, and three non-black jurors who were not challenged by the prosecutor had indicated they would consider whether a defendant could be rehabilitated in making that decision. *Id.* at 243-245. The prosecutor also challenged prospective juror Warren because he said the death penalty might be "the easy way out," but three non-black jurors who were not challenged by the prosecutor expressed virtually identical views. *Id.* at 247-249. The Court observed that these comparisons showed the the prosecutor's stated reasons for the strikes were "so far at odds with the evidence that pretext is the fair conclusion." *Id.* at 265.

The Court in *Miller-El II*, moreover, also relied on additional factors that made out a compelling case of discrimination: the obviously lop-sided statistical analysis; the purposeful use of the unusual Texas procedure known as the "jury shuffle;" the prosecutors' longstanding policy and written manual recommending the exclusion of minority jurors; the fact that the prosecutors in that case recorded the race of each juror; the prosecutors' pattern of manipulative questioning of minority jurors; and the prosecutors' questions of the challenged jurors at issue. The Court held, "when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination." *Id.* at 265.

In *Snyder* v. *Louisiana*, 128 S. Ct. 1203, a direct appeal case that was not subject to the restrictions on factual findings mandated by § 2254, the prosecutor challenged prospective juror Brooks because he was a college senior who was attempting to fulfill his student teaching requirement and might vote for a lesser guilt verdict to avoid the time required for a penalty phase. However, the prosecutor knew that the entire trial, including any penalty phase, would last only a week, and Brooks's dean had indicated he would not have a problem completing his work given that time frame. Accordingly, this Court found the proffered justification on its face "suspicious." *Id.* at

1211. In addition, after emphasizing that the record of the jurors' concerns about serving on the jury due to conflicting obligations had been thoroughly developed at trial, the Court found it "particularly striking" that the prosecutor did not excuse a white juror who was a contractor about to complete a house and whose jury service would mean that the occupants would not be able to move in that weekend as scheduled. That juror also had to take his children to and from school because his wife had just had surgery. The Court found that these obligations were "substantially more pressing" than those of Brooks. *Id.* at 1211. A second white juror who was not challenged had twice expressed concern about an important work commitment scheduled for that week at which his presence was essential. *Id.* at 1211. In light of these undeniable discrepancies, the Court concluded that the peremptory challenge was pretextual.

Miller-El II and *Snyder* illustrate that the inference of pretext as drawn from comparative juror analysis must be conspicuous, egregious, and unmistakable before it will amount to "exceptional circumstances" that trump the trial court's contemporaneous credibility finding. *Collins* stressed that merely arguable competing inferences will not suffice to supersede the trial court's finding under AEDPA. The Ninth Circuit's singular approach to *Batson* claims flouts these principles and allows the federal habeas court to conjure its own reasons for granting relief, regardless how tenuous or debatable those reasons may be.

B. No Rule Requiring Comparative Juror Analysis Was Clearly Established At The Time Of The State Court Decision

1. In reaching its erroneous result, the Ninth Circuit apparently assumed that, if the trial court "did not consider comparative evidence regarding the responses of M.C. and [D.J.] and the responses of non-African American members of the jury pool

during the jury selection process," Pet. App. 8-9, then its factual finding could be disregarded as unreasonable. The Ninth Circuit has endorsed exactly that methodology in a number of published and unpublished cases. *Kesser* v. *Cambra*, 465 F.3d at 358 ("the California courts, by failing to consider comparative evidence in the record before it that undeniably contradicted the prosecutor's purported motivations, unreasonably accepted his nonracial motives as genuine"); *Green* v. *Lamarque*, 532 F.3d 1028, 1030-31 (9th Cir. 2008) (California courts' decision was an unreasonable determination of the facts in light of the failure to undertake comparative juror analysis); see *Boyd* v. *Newland*, 467 F.3d 1139, 1147-51 (9th Cir. 2006) (because reviewing court should conduct comparative analysis, it unreasonably denied motion for full transcript of voir dire).[5]

The Ninth Circuit relied on *Kesser* v. *Cambra*, 465 F.3d at 360, see Pet. App. 14, where the en banc court reasoned:

> The Court in *Miller-El* applied comparative juror analysis to a case originally tried in 1986, remanded for a *Batson* hearing in 1988, and appealed under AEDPA in 2000. The Court's holding means that the principles

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[5] In *Cook* v. *Lamarque*, __ F.3d __, 2010 U.S. App. LEXIS 334 (9th Cir. Jan. 7, 2010), the Ninth Circuit again relied on its own comparative review of the record, although it rejected the *Batson* claim in that case. The majority purported to give some deference to the trial court's finding that the prosecutor's peremptory challenges were not racially motivated, see *id.* at *8-10, but in actuality based its decision on its own determination that the prosecutor's reasons were persuasive, *id.* at *11-41. The dissenting judge accorded no deference to the trial court's finding, stating that the state courts' failure to conduct comparative analysis rendered its conclusion "contrary to" Supreme Court law. *Id.* at *54-55 (Hawkins, J., dissenting). In *Cook*, as here, the Ninth Circuit failed to cite *Collins*, 546 U.S. 333.

> expounded in *Miller-El* were clearly established Supreme Court law for AEDPA purposes at least by the time of the last reasoned state court decision in *Miller-El*, handed down in 1992, before Kesser's 1993 trial.

Kesser, 465 F.3d at 360.

2. The Ninth Circuit's view reflects its misunderstanding of the requirement in 28 U.S.C. § 2254(d) that habeas relief must be based only on "clearly established" Supreme Court law. This refers to "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). If reasonable jurists could differ about the meaning of the Supreme Court's decisions, the rule is not clearly established. See *id.* This Court has repeatedly reminded the Ninth Circuit that the statute must be interpreted narrowly. For example, in *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004), the Ninth Circuit had faulted the state court for failing to consider a suspect's youth and inexperience in evaluating whether a reasonable person would feel free to leave for purposes of determining whether he was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1965). This Court reversed the grant of the writ because, although the *Miranda* custody test requires consideration of all objective circumstances, no Supreme Court opinion had mandated consideration of those particular factors. *Id.* at 666; accord, *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1419 (2009); *Schriro* v. *Landrigan*, 550 U.S. 465, 479 (2007); *Carey* v. *Musladin*, 549 U.S. 70, 77 (2006).

The mere fact that this Court performed comparative juror analysis in *Miller-El II* does not clearly establish that such analysis thereby became constitutionally compelled. To the contrary, the constitutional question did not arise in *Miller-El II*, because Texas, unlike California, did not bar comparative juror analysis for the first time on appeal at the time of the state court decision in that case. See *Cornish* v. *State*, 848 S.W.2d 144, 145 (Tex.

Crim. App. 1993) (citing *Young* v. *State*, 826 S.W.2d 141, 150-51 (Tex. Crim. App. 1991)); see also *Reed* v. *Quarterman*, 555 F.3d 364, 369-70 (5th Cir. 2009). Accordingly, in *Miller-El II*, this Court did not address whether comparative juror analysis was required even if state law barred such analysis for the first time on appeal. See *People* v. *Gray*, 37 Cal. 4th 168, 189, 118 P.3d 496, 511 (2005) ("*Miller-El* thus did not consider. . . whether an appellate court must conduct a comparative juror analysis for the first time on appeal, when the objector failed to do so at trial."); *Kesser* v. *Cambra*, 456 F.3d at 377 (Rymer, J., dissenting) ("In my view, appellate judges should not purport to undertake such a fact-intensive process for the first time on collateral review. As there is no clearly established law allowing—let alone requiring—us to do so in the circumstances of this case, I dissent on this footing as well."). The Court certainly did not "squarely address" that issue, a necessary ingredient for "clearly establishing" the law for AEDPA purposes. See *Wright* v. *Van Patten*, 552 U.S. 120, 125 (2008) (*per curiam*).

Kesser's reading of *Miller-El II* was further cast into doubt by *Snyder* v. *Louisiana*, 128 S. Ct. 1203. Although *Snyder* relied in part on comparative analysis, the Court expressly acknowledged the limitations of the practice when such comparisons have not been explored at trial:

> We recognize that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable. In this case, however, the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause.

Snyder, 128 S. Ct. at 1211. The Court also pointed out that the Louisiana Supreme Court "did not hold that petitioner had procedurally defaulted reliance on a comparison of the African-American jurors whom the prosecution struck with white jurors whom the prosecution accepted. On the contrary, the State Supreme Court itself made such a comparison." *Id.* at 1211 n. 2.[6]

Given the procedural postures of *Miller-El II* and *Snyder*, it remains uncertain whether comparative juror analysis is required for the first time on appeal in all cases. See *Mitchell* v. *Esparza*, 540 U.S. 12, 17 (2003) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous."); *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003) (only limited rule could be considered clearly established where Supreme Court's cases had "not been a model of clarity").

3. Even if *Miller-El II* can be read to clearly establish a rule compelling comparative juror analysis, it did so only as of the filing of that opinion in June 2005. This conclusion is underscored by the Ninth Circuit's own decisions. Prior to *Miller-El II*, the Ninth Circuit itself had unequivocally held that the issue had not been resolved by this Court. *Burks* v. *Borg*, 27 F.3d 1424, 1427 (9th Cir. 1994) ("The U.S. Supreme Court has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California

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[6] The California Supreme Court has noted that it is unclear whether this Court intended to signal from this footnote that it would honor a state procedural rule requiring that comparative juror analysis be conducted first in the trial court or be deemed forfeited. *People* v. *Lenix*, 44 Cal. 4th 602, 620, n. 14, 187 P.3d 946, 959, n. 14 (2008) ("The intended meaning of the footnote remains unclear. Without further guidance from the Supreme Court, we do not attempt to discern its meaning."). Thus, *Snyder* further clouded the issue. This case provides the opportunity to supply the clarity sought by the California Supreme Court

Supreme Court is right"). Even more telling, in *Boyd* v. *Newland*, 467 F.3d at 1144-1146, the Ninth Circuit ruled first in a pre-*Miller-El II* opinion that comparative analysis was not required, but then granted rehearing and decided that it was required after *Miller-El II*. Thus, any comparative juror analysis rule was not clearly established when respondent's case became final in 2004. It follows that the state courts' approach was not unreasonable. See *Knowles* v. *Mirzayance*, 129 S.Ct. at 1419 ("it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court").

The California Supreme Court had reasonably concluded, in its own pre-*Miller-El II* opinion in *People* v. *Johnson*, 30 Cal. 4th at 1324, 71 P.3d at 284, that comparative juror analysis was not required for the first time on appeal. *Id.* ("permitting appellate courts to overturn trial court decisions based on their own comparative analysis of a cold record, divorced from the nuances of trial not apparent from the record, is inconsistent with the deference reviewing courts necessarily give trial courts. We see nothing in the high court decisions requiring us to defer less to trial courts or engage in our own comparative juror analysis for the first time on appeal."). [7] The California Court of Appeal in this case followed *Johnson*, and also expressly relied on the relevant precedents from this Court that were available at the

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[7] The California Supreme Court has applied this rule in numerous capital cases that have not yet been finally resolved in the federal courts on habeas review. See, e.g., *People* v. *Heard*, 31 Cal. 4th 946, 971, 75 P.3d 53, 69-70 (2003); *People* v. *Catlin*, 26 Cal. 4th 81, 119 n. 5, 26 P.3d 357, 381 n.5 (2001); *People* v. *Ayala*, 24 Cal. 4th 243, 270, 6 P.3d 193, 208 (2000); *People* v. *Box*, 23 Cal. 4th 1153, 1190, 5 P.3d 130, 154 (2000); *People* v. *Ervin*, 22 Cal. 4th 48, 76, 990 P.2d 506, 520 (2000). If certiorari is not granted here, these cases will be subject on habeas corpus to the same untethered comparisons that the Ninth Circuit performed in this case.

time of its opinion, including *Batson*, *Hernandez*, and *Miller-El I*.[8] The state court's credibility finding was correct, and nothing more was required.

C. The Ninth Circuit's Factual Conclusions Were Wrong And At Best Merely Debatable

As noted, this Court has recognized that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." *Snyder* v. *Louisiana*, 128 S. Ct. at 1211. In this case, the Ninth Circuit failed to heed these inherent limitations on comparative juror analysis conducted for the first time by the federal habeas court. It clearly was not cautious about the possibility that the cold record could produce an unreliable inference. As a result, it reached factual conclusions that, if not wrong altogether, showed at most debatable disagreement with the state court.

For example, in rejecting as "wholly unpersuasive" the prosecutor's reliance on M.C.'s equivocation about whether she could be fair and impartial given the incident where her stepson had been prosecuted, Pet. App. 19, the Ninth Circuit

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[8] The California Supreme Court recently held that, after *Miller-El II* and *Snyder*, the California appellate courts should consider comparative juror analysis as "one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." *People* v. *Lenix*, 44 Cal. 4th at 621, 187 P.3d at 960. As that holding did not arise in the context of AEDPA, the court did not consider when the rule was "clearly established" for purposes of 28 U.S.C. § 2254(d). At most, *Lenix* shows that the California Supreme Court believed the rule emerged upon the issuance of *Miller-El II*.

relied on its comparison of M.C. with Juror 6. In discussing an incident of drunken violence in her household, Juror 6 characterized the incident as a "onetime unfortunate occurrence." When asked if the incident would influence her, Juror 6 stated, "I think I would be fair and impartial. It did affect me. I do believe that people do things under the affects of certain drugs or alcohol that maybe they wouldn't ordinarily do." SER 248. The Ninth Circuit found it "difficult to see how her response to the court's question about how the incident would affect her objectivity was any less equivocal than M.C.'s initial response." Pet. App. 22. However, when asked if her experience with the criminal justice system would affect her, M.C. oscillated between saying, "I don't think it would," "I don't know," "No," and "I'm not sure." SER 252, 253, 455. Juror 6, however, simply said she thought she would be fair and impartial.

Moreover, Juror 6's use of the words "I think" does not establish that she was equivocal; she could just as likely have demonstrated certainty by that phrase. "On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. 'Even an inflection in the voice can make a difference in the meaning. The sentence, "She never said she missed him," is susceptible of six different meanings, depending on which word is emphasized.'" *People* v. *Lenix*, 44 Cal. 4th at 622, 187 P.3d at 961 (citation omitted).[9]

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[9] The Ninth Circuit also relied on other supposedly equivocal responses cited by the district court. Pet. App. 26. Those all involved the kind of qualifiers that, like "I think," do not necessarily show equivocation. See Pet. App. 64 n. 8 ("I would certainly try my best to do that [listen carefully to the evidence];" "I don't think it [Ali's substance abuse] would affect my judgment.").

The Ninth Circuit also compared M.C. to Juror 8, who said several close friends had been sexually assaulted by men and a friend's father had tried to kill her mother. Juror 8 stated, "I guess what I was trying to say in the questionnaire was that if I learned that there had been some kind of conflict with, you know, the defendant and the Biletnikoff woman, I might be more sympathetic with the victim." SER 266. The Ninth Circuit found that Juror 8's statements were "far more equivocal than M.C.'s," and that the prosecutor's failure to strike Juror 8 "substantially undermines one of his supposed reasons for striking M.C.—that he was concerned about selecting a juror whose past experiences with domestic violence might affect her objectivity as a juror." Pet. App. 24. This remarkable conclusion simply is not sustainable. It cannot be surprising that the prosecutor would decline to strike a juror who had announced her sympathy for the victim.

In addition, the Ninth Circuit discounted M.C.'s "alleged initial equivocal statements," because she later said that there would not be any lasting effect on either the defense or prosecution as a result of her prior experience with the criminal justice system. Pet. App. 27. However, this Court has acknowledged that a prosecutor may genuinely harbor concerns despite a juror's assertions of fairness. In *Rice* v. *Collins*, 546 U.S. at 341, the challenged juror replied affirmatively when asked if she believed the charged crime should be illegal and disclaimed any other reason she could not be impartial, but this Court explained, "[t]hat the prosecutor claimed to hold such concerns despite Juror 1's voir dire averments does not establish that she offered a pretext." Under these circumstances, it was not unreasonable for the state appellate court to hold that "attorneys are entitled to exercise peremptory challenges based upon a prospective juror's first, unguarded responses to questioning, and discriminatory intent cannot be inferred from an attorney's reluctance to credit later responses." Pet. App. 110.

Finally, the Ninth Circuit faulted the prosecutor for "his failure to clear up any lingering doubts about M.C.'s objectivity by asking follow-up questions." The Ninth Circuit noted that the prosecutor asked a follow-up question of potential juror D.W. on his potential bias, and concluded that the prosecutor's alleged failure to similarly question M.C. "indicates that his later alleged concern with her objectivity was a make-weight." Pet. App. 25-26. However, the Ninth Circuit ignored the relevant record. The prosecutor *did* subsequently question M.C. on whether she thought her prior experience with the criminal justice system would affect her decision-making process. Moreover, M.C. again demonstrated her equivocation on this point, stating, "I'm not sure." SER 455. Thus, it was the Ninth Circuit, not the prosecutor, who mischaracterized the record in order to manipulate the outcome.

* * *

The Ninth Circuit's isolation of comparative juror analysis as the primary, if not exclusive, means of determining the prosecutor's credibility has resulted in the granting of the writ in a number of California judgments. Many more final convictions will be unnecessarily and unjustly at risk if the circuit court continues to review *Batson* claims without regard for the state court's credibility findings. As this case illustrates, such a result is particularly offensive where the trial court conducted a thorough and searching inquiry and reached a considered conclusion that the prosecutor's reasons were genuine. In granting relief in this case, the Ninth Circuit violated this Court's settled *Batson* rule requiring deference to the trial judge, as well as Congress' AEDPA restriction on federal court second-guessing of rational state-court factfinding.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: January 21, 2010

Respectfully submitted

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FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

MATTHEW CATE, DIRECTOR OF CALIFORNIA DEPARTMENT OF CORRECTIONS, *Petitioner*,

v.

MOHAMMED HAROON ALI, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOHAMMED HAROON ALI,
Petitioner-Appellant,

v.

RODERICK Q. HICKMAN, Director
California Department of Corrections
Respondent-Appellee.

No. 07-16731

D.C. No. CV-05-05243-PJH

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted
December 12, 2008—San Francisco, California

Filed July 7, 2009
Amended October 23, 2009

Before: A. Wallace Tashima and Marsha S. Berzon,
Circuit Judges, and Robert J. Timlin,*
District Judge.

Opinion by Judge Berzon

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*The Honorable Robert J. Timlin, United States District Judge for the Central District of California, sitting by designation.

COUNSEL

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ORDER

The opinion was filed on July 7, 2009, and published at 571 F.3d 902, is hereby amended as follows:

1. Slip Op. 8263, line 36: Replace <"reasonable" and demonstrated that the peremptory challenges had not been motivated by the juror's race.> with <"reasonable.">

2. Slip Op. 8264, line 14: Replace <agreed with the trial court's conclusion> with <concluded>

With these amendments, the panel has unanimously voted to deny the petition for panel rehearing. Judge Berzon has voted to deny the petition for rehearing en banc, and Judges Tashima and Timlin recommend denial.

The full court has been advised of the petition for rehearing en banc, and no judges of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are DENIED.

No further petitions for rehearing or rehearing en banc may be filed.

OPINION

BERZON, Circuit Judge:

In 2001, a California state court jury convicted Petitioner-Appellant Mohammed Ali of the first-degree murder of his girlfriend, Tracey Biletnikoff. During jury selection, the prosecutor, Stephen Wagstaffe, peremptorily struck the only two African-American members of the jury pool. Ali maintains that these strikes were racially-motivated and therefore violated his rights under the Equal Protection Clause of the Fourteenth Amendment. *See Batson v. Kentucky*, 476 U.S. 79 (1986). We hold that a comparative juror analysis, in combination with other facts in the record, demonstrates that the prosecutor's purported race-neutral reasons for striking at least one of the jurors were pretexts for racial discrimination. We further hold that the California Court of Appeal's contrary conclusion was not only incorrect, but unreasonably so. Accordingly, we reverse the district court's denial of Ali's petition for writ of habeas corpus and grant the writ.[1]

I. Background

A. Jury Selection

On November 8, 1999, the State of California charged Mohammed Ali with the first-degree murder of his girlfriend, Tracey Biletnikoff. Ali entered a plea of not guilty, and stood trial.

During the jury selection process, the state prosecutor used two of his peremptory challenges to strike the only African-Americans in the jury pool, first striking M.C.[2] and then Darrell Jefferson. Ali's

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[1] Ali also raised several ineffective assistance of counsel claims in his habeas petition. Because we grant Ali's petition based on his *Batson* challenge, we do not reach these additional claims.

[2] We refer to this juror by her initials in order to protect her privacy.

trial counsel challenged both these strikes in turn under *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978) (California's equivalent of *Batson*), requesting an evidentiary hearing on the issue of the prosecutor's motive. After the prosecutor struck Jefferson, the trial judge granted the request. At the ensuing hearing the prosecutor provided the following explanation for his strike of M.C.:

> M.C.—yesterday, I exercised my challenge there for the following reasons: We had an out-of-the-presence-of-the-jurors discussion with her about private matters wherein she talked about family members and the discussion with those involving the molestation of one child by another child, the involvement in the system. The way she described that, she ultimately told the Court she thought that that would not play a role, would not affect her judgment. Her words were that she doesn't think it will affect her judgment in this case. She did not say it won't. She said she doesn't think on that. It did involve family members within the system. That was, level one, a concern that I had. I have exercised challenges to other jurors for that same reason.
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> No. 2, she was very emphatic that—about—to Mr. Morales, and then to me later, about her concerns about attorneys and the ways they conducted themselves in the courtroom; that if it was anything less than professional and respectfully done that that would affect her.
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> THE COURT: Would that be an unreasonable expectation?
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> PROSECUTOR: It would not be an unreasonable expectation to say; that it would occur to say it would affect her judgment was unreasonable. That's why Mr. Morales initially dealing on this issue

followed up with that with her to say there were times he might cross-examine witnesses in an aggressive fashion and do that, to find out whether that would affect her judgment of him on that. I then followed up with her in my questioning to inquire about the same things. I thought we would act respectfully, but did she think it would affect her. Her demeanor, and the way she responded to that made it very clear to me that something she would—I think all of us would like to have occur, I expect it will occur, but as Mr. Morales has properly pointed out to several jurors, at times there could be an aggressive approach to the case; that sometimes there may not. That gave me cause for concern, more so, of course, is the prior involvement in the prior offense.

No. 3, Your Honor, the question was posed to her and it was posed by the defense about what she felt in terms of sitting in judgment of others. Her response to that was a pause, reflection, and then she said, yes, that could be a problem for her, sitting in judgment of others, because she was thinking of her Christian faith. Mr. Morales then explored that with her and went further into, Well, what we would be talking about here is judging facts and that type of a matter. She thought about it and said, Well, taking that into consideration, I believe that is something I could do without crossing my religious tenets. I thought there was hesitancy in what she said.

Obviously, it is my burden to get twelve jurors who could judge the case. I thought a combination of these factors gave me good reason to be concerned about her ability to fairly and impartially do it, and I

exercised a peremptory challenge for that reason and for that reason alone.

The trial court then asked the prosecutor to provide his reasons for striking Darrell Jefferson, to which he responded:

> I though Mr. Jefferson was an excellent juror up until the questioning here, based on what he did—you recall he came in and engaged in some banter with the Court when he was talking about his hardship request; that he—I believe it was a hardship, not publicity, inquiry that was done in chambers. As the Court stated a few minutes ago, when you expressed it, there were two things that caused me to change my mind. One of them was in response to Mr. Morales' question. That question had to do with there was something—where he talked about, we make decisions as we go along. It gave Mr. Morales some concern. It gave me some concern.
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> Mr. Morales explored it a bit further with him. Well, wait. You can't make the decision. He said, Well, we do it. That's how life works. I know—and he said, We may change them as we go along but we make decisions. I have a phenomenally great concern about the intellectualizing. I thought that would do—it would be an over-intellectualizing of the case.
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> I want jurors, what I think Mr. Morales was striving for with him, about keeping an open mind until the end and not making decisions. The Court arrived at a conclusion there that that may be a semantical difference or something else, and I respect that conclusion, when you told Mr. Morales [during Jefferson's voir dire] to move on, but it gave me cause for concern there.

But at that point, I was still considering the peremptory challenge, because evident to me when in response to a question from me he gave what—and it's personal to me. I respect it may be. I thought he gave me, and I respectfully use these words, a smart-ass answer.

THE COURT: Which [response]?

PROSECUTOR: The one when I commented to him, Is there anything else that you could think of that would cause you not to be fair and impartial, a question I have asked probably of over 50 jurors, 40 jurors in this case and never received other than no or maybe some answer. His was, I haven't done anything yet, immediately provoking a barrel of laughter throughout the courtroom. I was offended by that comment.

By those two things, combined with the fact that he had had some contact, although he said he could lay it aside, and I respect that possibility, with dealing with a public defender and hearing about those cases.

That combination of things caused me to change my mind. Race had nothing to do with either of these things.

Those are my reasons, Your Honor.

THE COURT: What was the reason again about the hardship that you assert, Mr. [prosecutor?]

. . .

PROSECUTOR: My comment was, when [Jefferson] came in and spoke with you in the hardship—I am relaying to the Court my thought process—and the banter he engaged in. I thought it was light-hearted. It was not the hardship itself that

concerned me. I thought it was a lighthearted banter, but I thought it reflected—the word I'm looking for is not disrespectful, but I thought it reflected a casualness that was not typical of jurors.

Again, this is a very subjective item and in and of itself would never give cause, but what I noted was the banter he engaged in was very much at ease, and that is not what I'm looking for in a juror; however, again, I would never exercise a challenge on that alone. That is merely factors that go into it. I've given you four factors I believe that went into that decision.

THE COURT: With all due respect, I thought I heard two, one having to do with his banter and, slash, casualness during the hardship discussion; and, two, the response to the question you had asked that elicited laughter in the courtroom and then the—make that three—the judgment back and forth and mindchanging.

What was the fourth one?

PROSECUTOR: Yes, I understand. The fourth one was the contact that he had had with cases where he had been—briefed may be too strong a word, but he had had a rundown from his brother, who was an appellate defender, on some case before the Supreme Court. Hearing about that, that gave me cause for concern.

After providing Ali with an opportunity to respond to these explanations, the trial court denied Ali's *Wheeler* motion. The court concluded that the prosecutor's proffered justifications were "reasonable" and demonstrated that the peremptory challenges had not been motivated by the juror's race. In reaching this conclusion, the trial court did not consider comparative evidence regarding the responses of M.C. and Darrell Jefferson and the

responses of non-African American members of the jury pool during the jury selection process.

Following the denial of Ali's *Wheeler* motion, the case proceeded to trial. After three days of deliberations, the jury found Ali guilty of first-degree murder. He was sentenced to 55 years to life in state prison.

B. California Appellate Proceedings

The California Court of Appeal affirmed Ali's conviction on direct appeal in an unpublished opinion. With respect to Ali's *Wheeler/Batson* claim, the appeals court agreed with the trial court's conclusion that "[t]he jury selection process was not marred by purposeful discrimination," holding that "substantial evidence support[ed] the trial court's finding that the peremptory challenges were exercised without a discriminatory purpose." Like the trial court, however, the California Court of Appeal did not engage in comparative juror analysis. At the time, California law did not permit a court to conduct comparative analysis for the first time on appeal. *See People v. Johnson*, 30 Cal.4th 1302, 1325 (2003), *rev'd sub nom. Johnson v. California*, 545 U.S. 162 (2005).[3]

In a separate order, the California Court of Appeal denied Ali's state habeas corpus petition without further analysis. The California Supreme Court denied Ali's petition for review and, later, rejected his state habeas petition in a one-lined disposition.

C. Federal Habeas Proceedings

Ali thereupon filed a federal habeas petition. The district court, unlike the California courts, performed a comparative juror analysis during its evaluation of Ali's *Batson* claim. In doing so, the

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[3] California courts are now required to conduct a comparative juror analysis even if such an analysis was not performed by the trial court. *See People v. Lenix*, 44 Cal.4th 602 (2008).

court found that such an analysis "called into question" two of the prosecutor's reasons for striking M.C. Nevertheless, the court concluded that:

> While the instant comparative juror analysis does reveal some minor faults in the prosecutor's reasoning, the court finds that these faults do not demonstrate racial bias or pretext. The court further finds that the prosecution's race-neutral justifications were sufficiently credible, clear, and reasonably specific. It therefore concludes that based on the totality of relevant facts, Ali has not shown purposeful discrimination . . . .

Ali asks this Court to reverse that decision.

II. Legal Standards

A. The *Batson* Framework

[1] The Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on the basis of their race. *See Batson*, 476 U.S. at 89. We apply a now-familiar three-part test when evaluating a defendant's equal protection challenge to a prosecutor's use of peremptory strikes. *See id.* at 96-98; *see also Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006) (en banc): First, the defendant must make a prima facie showing that a challenge was based on race. *See Kesser*, 465 F.3d at 359. If such a showing is made, the burden then shifts to the prosecutor to produce a "clear and reasonably specific" race-neutral explanation for challenging the potential juror. *See id.* Third and finally, the court must determine whether, despite the prosecutor's proffered justification, the defendant has nonetheless met his burden of showing "purposeful discrimination." *See id.* To make this last determination, the court evaluates the "totality of the relevant facts" to decide "whether counsel's race-neutral explanation for a peremptory challenge should be believed." *See id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). The

consideration of "purposeful discrimination" at step three of the *Batson* inquiry is a factual one. *See Batson*, 476 U.S. at 98 n.21 ("[A] finding of intentional discrimination is a finding of fact entitled to appropriate deference by a reviewing court.") (internal quotation marks and citations omitted); *see also Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

Here, neither party challenges the trial court's conclusion that Ali established a prima facie case and that the prosecutor satisfied his step two burden by providing specific race-neutral explanations for his strikes of M.C. and Darrell Jefferson. The sole issue therefore is whether the California courts and the district court erred in concluding that Ali had failed to meet his ultimate burden of establishing that the prosecutor's challenges were motivated by purposeful racial discrimination.

B. The Standard of Review

1. Review of the State Court's Decision

Section 2254(d)(2) of Title 28, United States Code governs our review of the state appellate court's finding that the prosecutor did not engage in purposeful discrimination. *See Kesser*, 465 F.3d at 358 & N.[sic]1.[4] Pursuant to §2254(d)(2), we must defer to the California appellate court's conclusion

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[4] Relying on our opinion in *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004), we held in *Kesser* that § 2254(d)(2), rather than § 2254(e)(1), governs our review of a state court's factual determination of the presence or absence of discriminatory animus where our review is based entirely on information that was contained in the state court record. *See Kesser*, 465 F.3d at 358 n.1. In this case, as in *Kesser*, the relevant evidence is found in answers to juror questionnaires and a transcript of voir dire, both of which were before the California Court of Appeal. Section 2254(d)(2) therefore applies. We note, however, that, also as in *Kesser*, "the question of which AEDPA standard we apply [is] academic, because the record satisfies either standard." *See id.*

that there was no discrimination unless that finding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(2).[5]

2. Review of the District Court's Decision

We review *de novo* a district court's denial of a habeas corpus petition. *See Juan H. v. Allen*, 408 F.3d 1262, 1269 n.7 (9th Cir. 2005). If the district court makes independent factual findings, we review those findings for clear error. *See id.* If the district court does not make independent factual findings, we simply review the state court's findings under § 2254(d)(2), as discussed above.

In this case, the district court reviewed the state court record *de novo* and, after conducting a comparative juror analysis, found that the prosecutor did not act with a racially discriminatory motive when he peremptorily struck M.C. and Darrell Jefferson. Although the district court reviewed the state court record independently, its ultimate factual finding on the issue of the prosecutor's discriminatory intent was one that had already been made by the California Court of Appeal. Moreover, the district court's conclusion was based entirely on information that had been before the California appellate court. As a result, the district court did not make any factual findings that were independent of those made by the state appellate court. As both we and the district court are therefore obliged to review the California Court of Appeal's decision under the reasonableness standard provided in § 2254(d), we review the district court's *Batson* analysis *de novo*.[6]

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[5] For AEDPA purposes, we evaluate the state court's last reasoned decision as the basis for the state court's judgment. *See Franklin v. Johnson*, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002). In this case, that decision was the California Court of Appeal's opinion affirming Ali's conviction on direct appeal.

[6] For the reasons discussed below, the district court's

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III. Discussion

A. A Prosecutor's Challenge of Juror M.C.

The prosecutor provided three reasons for his decision to strike M.C. First, he stated that he was concerned that M.C.'s judgment and objectivity as a juror might be adversely affected by the fact that her daughter had been the victim of an attempted molestation by the daughter's half-brother. Second, he said that he excused M.C. because she had indicated that "anything less than professional and respectful[]" conduct on the part of the attorneys might affect her view of the case. He explained that although it was reasonable for her to expect the attorneys to act professionally, he was concerned that she would react negatively to aggressive cross-examination. Finally, the prosecutor asserted that he struck M.C. because she had said that she might have trouble "sitting in judgment of others" due to "her Christian faith."

Without evaluating each of these justifications individually or performing comparative juror analysis, the California Court of Appeal concluded that "substantial evidence support[s] the trial court's finding that the peremptory challenge[] [of M.C. was] exercised without discriminatory purpose." The district court, however, did evaluate each of the proffered justifications one at a time and conducted comparative juror analysis. It found that such an analysis largely, although not entirely, undermined the prosecutor's first justification and wholly failed to support the second. At the same time, the court concluded that a comparative analysis buttressed the prosecutor's third explanation and that, "on balance,"

(...continued)
finding that the prosecutor did not act with a discriminatory motive when he struck M.C. was clearly erroneous. Therefore, even if we considered that finding to be an independent one, we would not uphold it.

Ali had not shown that the prosecutor's removal of M.C. was motivated by "purposeful discrimination."

Our own review of the record convinces us that each of the prosecutor's justifications is logically implausible, undermined by a comparative juror analysis, and otherwise unsupported by the record. As we held in *Kesser*, where "an evaluation of the voir dire transcript and juror questionnaires clearly and convincingly refutes each of the prosecutor's non-racial grounds," we are "compell[ed] [to conclude] that his actual and only reason for striking [the relevant juror] was her race." *Kesser*, 465 F.3d at 360. Such a conclusion is compelled in this case. The California Court of Appeal's contrary finding was not only incorrect, but an "unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2).

1. Reason 1: The Attempted Molestation of M.C.'s Daughter

On her juror questionnaire, M.C. indicated that she had had contact with law enforcement "when [there] was an attempt of molestation of my daughter." M.C. then discussed this response during private voir dire. The discussion transpired as follows:

> COURT: [On your questionnaire you wrote] private, "When there was an attempt of molestation of my daughter." That's the area you would like to explore privately, right?
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> M.C.: Uh-huh.
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> COURT: How old was your daughter?
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> M.C.: My daughter was 14.
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> COURT: How old is she now?
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> M.C.: She is 22.
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> COURT: This is about eight years ago?
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> M.C.: Yes.
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> COURT: Who was the supposed molester?

M.C.: Her brother.

COURT: Was he living at home with you as well?

M.C. No. It's a child by another lady that was visiting our home. Because he had been having problems with where he lived with his mom, and he was staying with us.

COURT: Was your significant other or your husband the father of this boy?

M.C.: Yes.

COURT: I'm sorry?

M.C.: Yes.

COURT: So he was at some other home having problems there, and I take it that you agreed and your husband wanted to help him out by having him live with you?

M.C.: Yes.

COURT: How long was he in the home before this happened?

M.C.: I would say about three months.

COURT: Was it reported to the authorities?

M.C.: Yes.

COURT: In this county or elsewhere?

M.C.: In this county.

COURT: What happened? By the way, how old was he when this happened?

M.C.: He was about 17 years old.

COURT: So what happened?

M.C.: There was an incident, my daughter came to our room and reported it to us, and I called the police department, and the police came and they arrested the young man and took him to Juvenile Hall.

Because he resided, his home residence was in Santa Clara County, they took him from San Mateo County to Santa Clara County, and he was in Juvenile Hall until we had—I call it a trial, court, whatever. And we went to court, and then they put him on a probation where he couldn't be in contact with her for, you know, x number of years.

COURT: Did your daughter testify in that court hearing?

M.C.: Yes. In a private chamber.

COURT: Is that the only incident that you were asking to have us discuss privately?

M.C.: Yes.

COURT: That's the only time that that molestation occurred was that one incident?

M.C.: Yes.

COURT: How do you think that incident and all of its ramifications, going to court and all of that, might influence you in this case?

M.C.: I really don't think—I don't think it would have any bearing. I don't know. I don't think it would. My daughter is 22 years old. She didn't have to have—we all had to do family counseling.

COURT: Did family counseling help her deal with the molestation?

M.C.: Yes. I know that it does still affect her even though she is 22 years old, and we have discussed it recently, before I was called to jury duty. It still has an effect on her. However, I didn't want it to be discussed in open court—

COURT: Don't worry about it.

M.C.: —in open session, so I thought I would put it out there.

COURT: You don't have to apologize for putting "private" on there. That's why we have these processes. Was it the East Palo Alto Police Department or was it the sheriff's office that did the investigation?

M.C.: I believe it was the sheriff's department.

COURT: Do you remember who the investigating officer was?

M.C.: No.

COURT: Anything about their the law enforcement angle, the local police department, whether it was the police or the sheriff, did you feel that they treated you with respect and your daughter with respect as a result of all of this?

M.C.: Yes.

COURT: Did you think it was a fair process that you had to go through and your daughter had to go through?

M.C.: Yes.

COURT: Would there be any lasting effect on either the defense or the prosecution in this case as a result of your experiences or knowledge about that?

M.C.: No.

COURT: Mr. Morales, any questions?

DEFENSE: No questions.

COURT: Mr. [Prosecutor]?

PROSECUTION: No.

According to the prosecutor, this exchange provided the first race-neutral reason for his

dismissal of M.C. He described that reason as follows:

> M.C. —yesterday, I exercised my challenge there for the following reasons: We had an out-of-the-presence-of-the-jurors discussion with her about private matters wherein she talked about family members and the discussion with those involving the molestation of one child by another child, the involvement in the system. The way she described that, she ultimately told the Court she thought that that would not play a role, would not affect her judgment. Her words were that she doesn't think it will affect her judgment in this case. She did not say it won't. She said she doesn't think on that. It did involve family members within the system. That was, level one, a concern that I had. I have exercised challenges to other jurors for that same reason.

The district court perceived this explanation as revealing not one, but two concerns that the prosecutor had with M.C. as a juror. The prosecutor's first concern, according to the district court, was that M.C.'s equivocal initial response to the trial court's question about how the child molestation incident might influence her ability to sit as a juror in Ali's case indicated that she might not be able to judge the case objectively. The district court described the prosecutor's second qualm as a "concern with [M.C.'s] involvement in the criminal justice system . . . ."

In evaluating these two expressed bases for striking M.C., the district court concluded that a comparative juror analysis undermined the prosecutor's first purported concern but supported the second, because "the prosecutor's concern with a potential juror's, including M.C.'s, involvement in the system was legitimate and consistently applied without apparent discriminatory purpose."

As explained below, we agree with the district court's conclusion that a comparative juror analysis, as well as other evidence in the record, thoroughly undermines the prosecutor's alleged first concerns with M.C.'s objectivity. We disagree, however, with the court's determination that the prosecutor was legitimately troubled by M.C.'s "involvement in the system." As to the second concern, contrary to the district court's assertion, a comparative juror analysis reveals that the prosecutor did not "consistently" strike jurors who had experience with the criminal justice system. In fact, he accepted at least two white jurors who had more problematic experiences than M.C. Thus, even if we assume, like the district court, that the prosecutor's first explanation for his strike of M.C. conveyed two distinct concerns, a review of the record, including comparative juror analysis, compels the conclusion that both the alleged justifications were pretextual make-weights.

1.a. M.C.'s Objectivity

[2] The prosecutor's assertion that he excused M.C. because she initially hesitated when responding to the court's inquiry about the effect of the molestation incident on her ability to judge Ali's case is wholly unpersuasive, for several reasons.

[3] First, to the extent that the attempted molestation of her daughter might affect M.C.'s impartiality, any bias on M.C.'s part logically would favor the prosecution, not the defense. To be believable, a prosecutor's "[r]easons must be 'related to the particular case to be tried.'" *Kesser*, 465 F.3d at 359 (quoting *Batson*, 476 U.S. at 98). In this case, the victim, Tracey Biletnikoff, was, like M.C.'s daughter, a young woman and the victim of a domestic assault.

Moreover, M.C.'s description of the molestation focused entirely on the effect that the incident had on her daughter, with whom M.C. still lives. She stated, for example, that "I know that [the molestation incident] does still affect [my daughter] even though she is 22 years old, and we have discussed it recently,

before I was called to jury duty. It still has an effect on her." When the trial court asked M.C. if the incident might influence her in evaluating Ali's case, M.C. again focused on her daughter, stating "I really don't think—I don't think it would have any bearing. I don't know. I don't think it would. *My daughter is 22 years old.* She didn't have to have—we all had to do family counseling." (emphasis added) If anything, then, M.C.'s experience and her description of that experience would suggest that she was more likely than the average juror to identify with the *victim* of the crime.

The State disagrees with this assessment of M.C.'s potential bias, arguing instead that the molestation incident reveals that M.C. may have "harbored some sympathy" for the perpetrator of the daughter's molestation, M.C.'s stepson. This view simply cannot be squared with the record.

Tellingly, M.C. never refers to the perpetrator as either her son or her stepson. Instead, she describes him alternately as "[my husband's] child by another lady," "the young man," and her daughter's "brother." In addition, M.C. stated that the stepson had only lived with the family for three months prior to the incident and was prohibited from contacting her daughter for several years afterwards. There is absolutely no indication that M.C. had any affection for, sense of family responsibility for, or ongoing relationship with the perpetrator.

The State nevertheless tenders the following "evidence" of M.C.'s alleged sympathy for the stepson: First, the State argues that "although her stepson received what could be perceived as a light sentence for a molestation that still affected her daughter eight years later, [M.C.] indicated that she thought the process had been fair." The State then suggests, absurdly, that "even though the molestation was apparently serious enough to merit police intervention and juvenile court proceedings, [M.C.] *appeared to minimize* the incident by referring to it as an 'attempt of molestation' in her juror questionnaire." Attempted sexual battery is a serious crime in California, *see People v. Dixon*, 75

Cal.App.4th 935, 942 (1999), and could certainly trigger law enforcement action. Nothing in the record indicates that there was actual, as opposed to attempted, molestation. The State's suggestion that M.C. "appeared to minimize" the incident, rather than to report it accurately, is therefore wholly without merit.

Two sentences later the State lurches further from the record when it writes, "Indeed, we note that the prosecutor seemed genuinely concerned about [M.C.'s potential sympathy for the defendant], and questioned [M.C.] about whether she might identify with Ali because she had a son in the same age range whom she might be able to picture in the same circumstances." It is true that the prosecutor asked M.C. about having a son the same age as Ali. And it is also true that M.C. expressed some concern over that fact. However, it is equally clear that M.C. was referring to her *biological* son, with whom she and her daughter live.

Contrary to the State's contention, then, there is no evidence in the record from which the prosecutor could have inferred that M.C. harbored sympathy for the stepson. She mentioned him only briefly, did not refer to him as her son or stepson, and expressed clearly and repeatedly her ongoing concern for her daughter and her daughter alone. It is little wonder that neither the prosecutor nor the State put forward this explanation previously.

[4] Second, a comparative juror analysis reveals, as one might expect, that the prosecutor *favored* jurors who had been the victims of domestic abuse or who had friends who had been victims of domestic abuse or who had friends who had been victims of such abuse, even if the juror indicated that his or her experiences might affect his or her objectivity. Indeed, as in *Kesser*, "it seems that experience with domestic violence and abuse was no a liability, at least in the prosecutor's view. In fact, he might have found [a] woman a good juror precisely *because* she was the mother of a vulnerable daughter who, like [Ali's girlfriend,] had fallen victim to abuse." 465 F.3d at 367.

Juror 6, for example, described during voir dire an event that culminated in her husband's arrest: The husband, while drunk, began to physically abuse the couple's 15 years old son. When Juror 6 intervened, her husband shoved her backwards into the oven door, hard enough to incapacitate Juror 6. The police were called and the husband arrested. Although he spent a night in jail, no charges were filed.

As in M.C.'s case, the court asked Juror 6 whether the incident would influence her objectivity when evaluating Ali's case. She replied,

> I think I would be fair and impartial. It did affect me. I do believe that people do things under the effects of certain drugs or alcohol and maybe they wouldn't ordinarily do.

Two questions later, she clarified that she thought drug use was "a factor to evaluate," but did not automatically excuse murder. She was not asked follow-up questions regarding her objectivity.

Juror 6's status as the direct victim of domestic violence provided her with a slightly closer connection to Biletnikoff than M.C., who was the mother of the victim. Nonetheless, it is difficult to see how her response to the court's question about how the incident would affect her objectivity was less equivocal than M.C.'s initial response. Compare Juror 6 ("I think I would be fair and impartial. It did affect me.") with M.C. (first stating "I really don't think—I don't think it would have any bearing. I don't know. I don't think it would[,]" but then answering an unequivocal "No" when asked "Would there be any lasting effect on either the defense or the prosecution in this case as a result of your experiences or knowledge about that?"). In addition, Juror 6, unlike M.C., did express some sympathy for the perpetrator, noting that "people do things under the effects of certain drugs or alcohol that maybe they wouldn't ordinarily do." This statement is particularly relevant in this case, because evidence introduced at trial showed that Ali was a chronic

drug user and had been using drugs and alcohol on the days preceding Biletnikoff's murder.

A comparison of M.C. to Juror 8 is likewise instructive on this point. Like M.C., Juror 8 had experience with domestic violence. During voir dire, she explained that she had "several close friends who have been . . . sexually assaulted by some male figure in their life." She also stated that she had a close friend whose father had attempted to kill the friend's mother. When asked how these experiences might affect her approach to this case, she responded,

> I guess what I was trying to say in the questionnaire was that if I learned that there had been some kind of conflict with, you know, the defendant and the Biletnikoff woman, I might be more sympathetic with the victim.

In the questionnaire itself, she had written, "I believe that my friend's experiences with sexual abuse by men will make me biased against any man who may have assaulted or murdered a woman." Although she later stated that she could "look at [the case] objectively," she had the following exchange with Ali's attorney after making that statement:

> Q. This is indeed a domestic violence case. How do you think you would be as a juror sitting on this case having those experiences or at least through your friend?
>
> A. I cannot say that would not be part of my opinion in my thought process. I wouldn't make a decision just based on the fact that this involves domestic violence. A defendant here shouldn't be guilty just because of that. It's not that. That plays into my thought process, though.
>
> . . .
>
> Q. Saying that statement, from what I'm hearing, there may be a little bit of bias if

you sat as a juror on this case; is that correct?

A. That's correct.

The prosecutor's failure to strike Juror 8 substantially undermines one of his supposed reasons for striking M.C.—that he was concerned about selecting a juror whose past experiences with domestic violence might affect her objectivity as a juror. Juror 8 acknowledged, at several points, that she might have problems remaining impartial if the case involved domestic violence. In addition, Juror 8's statements were far more equivocal than M.C.'s. She vacillated from "I might be more sympathetic with the victim" to "I could look at [the case] objectively" and then back to "there may be a little bit of bias if [I] sat as a juror on this case."

In short, the prosecutor's reason for striking M.C.—her equivocal response to a question about the impact of a domestic violence incident on her objectivity—applies with equal or greater force to Jurors 6 and 8, both of whom he accepted. "The fact that [a proffered] reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext." *Miller-El*, 545 U.S. at 248.

The State argues that a potential juror, D.W., whom the prosecutor peremptorily struck from the jury, not Jurors 6 and 8, is the most appropriate person for a comparative analysis as to the prosecutor's explanation regarding experience with domestic violence. D.W., like M.C., described an incident involving the molestation of one family member by another. In D.W.'s case, his eight-year-old son had molested his two-year old daughter.

A comparison of M.C. to D.W., however, only confirms that the prosecutor was concerned with the *direction* of a juror's bias, not with objectivity. As noted, M.C.'s discussion of her daughter's molestation was focused entirely on the effect that the incident had had on her daughter's life. M.C. mentioned the alleged perpetrator, her husband's son by another woman, only briefly and only to point out

that the boy had been living with her family for a very short time and was subsequently prohibited from contacting her daughter.

By contrast, the focus of D.W.'s discussion was almost exclusively on the actions of his son, the perpetrator of the crime. He even suggested that his daughter, the two-year-old victim, did not remember and so was not affected by the incident. The reasonable inference, then, was that D.W. might be more sympathetic to Ali than the average juror.

More importantly, D.W. *actually expressed* a bias in favor of the defendant:

> DEFENSE: Can you give [the prosecution] a fair case? Can you give them a fair shake?
>
> . . .
>
> D.W.: I think I can give the prosecution a fair shake.
>
> DEFENSE: How about the defense?
>
> D.W.: I'm certain I can give the defense a fair shake.

M.C., on the other hand, never expressed a preference for the defense. She simply indicated originally that she did not think the molestation incident would affect her and, in the end, stated unequivocally that it would not.

[5] An analysis of the record supplies a third reason why the prosecutor's alleged concern with M.C.'s objectivity is implausible: his failure to clear up any lingering doubts about M.C.'s objectivity by asking follow-up questions. *See Kesser*, 465 F.3d at 364 (" 'We expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.'") (quoting *Miller-El*, 545 U.S. at 244). After the trial court finished asking M.C. about the molestation incident, including questions about how the incident might affect her objectivity, the court provided the prosecution with an opportunity to ask questions of his own. He did not do so.

This failure to seek clarification is even more striking in light of the fact that the prosecutor *did* ask a follow-up question on potential bias during the private voir dire of potential juror D.W., who, as noted, also relayed a molestation incident involving family members. At the end of D.W.'s interview, the trial court asked, "How do you think the circumstances of this incident would influence you here in this case?" D.W. responded, "I don't think they have any impact whatsoever." At that point, the judge asked the prosecutor if he had any questions. Unlike in the questioning of M.C., the prosecutor responded affirmatively, and proceeded to ask D.W."

> Very briefly. On that last question, sir, good morning. Does it—by impact, what we're looking to determine is does it cause you to be sympathetic to people at all that have problems of their own such that it might influence you, or the inverse, or it causes you to be intolerant to somebody that has committed a crime? Do you think it's a problem either way?

D.W. responded in the negative.

The prosecutor's failure similarly to ask M.C. a follow-up question indicates that his later alleged concern with her objectivity was a make-weight. Further, as it was apparent from D.W.'s responses that D.W.'s biases might lie with the defendant, the follow-up questioning of D.W. confirms once again the prosecutor was concerned with the direction of a prospective juror's bias, not with objectivity.

[6] Fourth and finally, while M.C. hesitated in her initial response to a very general question about the effect the molestation incident might have on her judgment as a juror, she later responded to a more specific question about whether the incident would have an "effect on either the defense or the prosecution in this case" with an unequivocal "no." As the district court stated, "[t]he record is replete with examples of other [unchallenged] jurors qualifying or even completely changing their answers." Juror 8, for example, vacillated on the

issue whether she could remain objective. In her final statement about the issue, Juror 8 actually stated that she would be a little biased, whereas M.C. concluded by stating unequivocally that she could judge Ali's case objectively. Given the answers of other jurors as to potential bias, M.C.'s alleged initial equivocal statements about her ability to remain objective could not have been a neutral reason for excusing her from jury service in the case.

[7] In sum, a comparison of M.C. to Jurors 6 and 8 and to potential juror D.W. demonstrates that the prosecutor favored potential jurors who, like M.C., were likely to sympathize with the victim and disfavored those, like D.W., who may have been biased toward the defendant. This comparative analysis therefore leads to only one reasonable conclusion: the prosecutor's asserted concern about objectivity was not an actual reason for his decision to strike M.C., but was pretext.

1.b. M.C.'s Involvement in the System

[8] An analysis of the record as a whole likewise invalidates the prosecutor's statement that he struck M.C. because of an alleged concern with M.C.'s involvement in the criminal justice system.

[9] Nothing in the record indicates that M.C. had had a negative experience with the criminal justice system that might bias her against the prosecution. In fact, the opposite is true: When questioned about her interactions with public officials following the attempted molestation incident, M.C. informed the court that she thought that the process that she and her daughter had gone through was "fair," and that the police had treated her and her daughter with respect.

[10] In *Kesser*, we rejected in similar circumstances the prosecutor's alleged concerns about a juror's involvement with the criminal justice system, noting that the record

> show[s] that [the struck potential juror] felt comfortable with a system that had prosecuted and incarcerated her father for the offense. When she was asked if she

> was 'satisfied with [the] conclusion' of the proceedings, she answered "Yes." On her questionnaire, she also answered that she was satisfied with the response of the police, the district attorney, and the court system.

Kesser, 465 F.3d at 364. "In fact," we observed, the struck potential juror "seems a better juror for the prosecution than others who were accepted despite minor run-ins with the law that might foster resentment. *Id.* at 365.

[11] As in *Kesser*, there were other jurors in this case who had experience with the criminal justice system but were not struck. Juror 7, for example, had actually been arrested and prosecuted (including a court appearance) for a minor crime. She described the incident as "a very negative experience," although she did note that the police had been respectful and that her bitterness over the affair was directed primarily towards an ex-roommate. Nonetheless, if "involvement with the system" was a legitimate concern of the prosecutor, he would almost certainly have struck Juror 7. Moreover, like the juror in *Kesser*, M.C. was, if anything, a better juror for the prosecution than juror 7 who was accepted despite an arrest that she described as "a very negative experience."

Juror 6 also had experience with the criminal justice system: Juror 6's husband had been arrested for assaulting her and had spent a night in jail. Although charges were never filed, Juror 6 hired an attorney in response to the arrest, and the attorney "handled" the matter with the district attorney's office and the police department. Thus, Juror 6 also had some involvement with the criminal justice system.

[12] In sum, even if severed from the objectivity rationale, the prosecutor's "involvement in the system" explanation for his strike of M.C. is not, on the record as a whole, a plausible, race-neutral justification for the strike. No court could reasonably conclude otherwise.

2. Reason 2: M.C.'s Expectation that the Attorneys Would Act Professionally

During an exchange with Ali's counsel, M.C. provided the following views on the conduct of lawyers:

> DEFENSE: Do you have any opinions about criminal defense attorneys?
>
> M.C.: No.
>
> DEFENSE: Do you think they will say or do anything to get their clients off?
>
> M.C.: Well, I haven't had that much experience in being in the company of defense attorneys or attorneys at all. I feel that they will do the right thing for their client. Their position is to go the last line for their client. I would hope that that would be done in a decent and respectable manner.
>
> DEFENSE: I understand that. Any opinions about prosecutors, they'll say or do anything to get a conviction?
>
> M.C.: My same statement goes for them as well.
>
> DEFENSE: You would hope that everybody would act professionally?
>
> M.C.: Yes.
>
> DEFENSE: Let me ask you this: If at sometime during this trial we, Mr. Buenaventura [the defense attorney's co-counsel] and I, have to sort of aggressively cross-examine some witnesses, how would you feel about that?
>
> M.C.: Well, I believe that as long as you don't cross the line of being disrespectful and still keep it in a professional matter.

> DEFENSE: You wouldn't penalize us for aggressively advocating for our client?
>
> M.C.: No.
>
> DEFENSE: Just as long as we do it in a respectful professional manner?
>
> M.C.: Yes.
>
> DEFENSE: That seems fair.

The defense later asked M.C. a series of similar questions, eliciting nearly identical answers.

M.C.'s expectations regarding the conduct of the attorneys during trial was the basis for the prosecutor's second race-neutral reason for his strike. As the prosecutor explained, "No. 2, [M.C.] was very emphatic that—about—to Mr. Morales, and then to me later, about her concerns about attorneys and the way they conducted themselves in the courtroom; that if it was anything less than professional and respectfully done that would affect her." He further clarified that his concern was that she would view "aggressive" cross-examination as unprofessional conduct and hold that against one side or the other.

The district court did not credit his explanation. It noted that "[t]he prosecutor himself gave a short speech about the level of professionalism the attorneys would maintain during the trial, thus suggesting that [M.C.'s] expectation was not unreasonable or particularly relevant to [M.C.'s] ability as a juror." It also pointed out that Juror 1 had expressed similar expectations regarding the professionalism of the attorneys, but had not been struck.

[13] We agree with the district court. As the above excerpt reveals, M.C. simply expressed reasonable expectations concerning attorney behavior. She did *not* say, as the prosecutor stated during the *Wheeler/Batson* hearing, that unprofessional conduct or aggressive cross-examination would "affect her judgment." *See Wheeler/Batson* Hearing Transcript (Prosecutor: "[T]hat it would occur [to M.C.] to say it would affect

her judgment was unreasonable"). Instead, she said the opposite—that she would *not* penalize the attorneys for aggressively advocating on behalf of their clients. The prosecutor's mischaracterization of M.C.'s testimony is evidence of discriminatory pretext. *See Miller-El*, 545 U.S. at 244.

The voir dire transcript also demonstrates that Juror 1, who the prosecutor did not strike, expressed similar expectations about the lawyers' conduct.

> DEFENSE: . . . [Do you have] any opinions about defense attorneys or prosecutors. They'll say or do anything to win?
>
> JUROR 1: No, no. Not any more than a policeman might lie.
>
> DEFENSE: I take it you say that because we sort [sic] have been talking a lot about police officers and witnesses and stuff like that?
>
> JUROR 1: Exactly, exactly. Then you said earlier that everybody should act professionally and above-board.
>
> DEFENSE: You probably agree with that statement.
>
> JUROR 1: Absolutely.

[14] Given that M.C.'s expectations were reasonable, that they were fully consistent with the prosecutor's own views about the level of professionalism that the lawyers would maintain during the trial, and that they were very similar to those of a juror who the prosecutor did not challenge, the prosecutor's "professionalism" justification, like his first explanation for his strike of M.C., is contradicted by the record. We therefore agree with the district court that the attorney professionalism explanation was not genuine and that the California courts unreasonably accepted it as non-racially motivated.

3. Reason 3: M.C.'s Reluctance to Judge

The prosecutor's third reason for striking M.C. was based on the following exchange between M.C. and Ali's counsel:

> DEFENSE: I believe in your questionnaire that you said you are a regular member of a church?
>
> M.C.: Yes.
>
> DEFENSE: Anything about your spiritual training or spiritual practice that will prevent you from judging other people if you're chosen to be a juror?
>
> M.C.: No.
>
> DEFENSE: You had to think about that for a second.
>
> M.C.: Just because the phrase "judging." Here in this position would mean something totally different than I would apply as far as my Christian faith would be interpreted. More or less this is to make a decision based on information I've gained. Judging to me means I've made a decision based on no information, just from what I see and not knowing the person or just arbitrarily. To me, that's a difference.
>
> DEFENSE: I understand that difference. We're going to do our best, and as you've heard over and over again, it's [the prosecutor's] job to present evidence, and he will do his best to present lots of evidence to you, and the defense may also present evidence to you. But at the end of the day, there still may be some questions about what exactly happened or what somebody was actually thinking.
>
> M.C.: Yes. That's true.
>
> DEFENSE: What I'm saying is you may not have exactly every fact that you need

> when you retire back to the jury deliberation room.
>
> M.C.: That's correct. But then that would be—to me that would be—I wouldn't say that's judging. That would be making a decision based on the evidence that has been presented and taking that into consideration.
>
> DEFENSE: What you're saying is that you would do your very best with the information that you have?
>
> M.C.: Yes.

At the *Wheeler/Batson* hearing, the prosecutor explained why this exchange provided him with a race-neutral reason to strike M.C.:

> No. 3, Your Honor, the question was posed to her and it was posed by the defense about what she felt in terms of sitting in judgment of others. Her response to that was a pause, reflection, and then she said, yes, that could be a problem for her, sitting in judgment of others, because she was thinking of her Christian faith . . . I thought there was hesitancy in what she said.

The district court recognized that the prosecutor misstated M.C.'s testimony about her ability to judge others, but nonetheless credited this explanation. We do not agree, for several reasons.

[15] First, we have already concluded that the prosecutor offered two (or three) pre-textual reasons for striking M.C. That the other reasons were pretextual raises an inference that this final rationale is also a make-weight. As the Supreme Court explained in *Snyder v. Louisiana*, 128 S.Ct. 1203, 1212 (2008), "the prosecution's proffer of [one] pretextual explanation naturally gives rise to an inference of discriminatory intent," even where other, potentially valid explanations are offered. *See also*

Kesser, 465 F.3d at 360 ("[I]f a review of the record undermines the prosecutor's stated reasons, *or many of the proffered reasons*, the reasons may be deemed a pretext for racial discrimination.") (emphasis added) (internal quotation marks and citations omitted); *United States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989) ("[T]he fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against [the] sufficiency [of the remaining two reasons].")

[16] Second, the prosecutor once again mischaracterized M.C.'s comments, thereby providing further evidence of pretext. *See Miller-El*, 545 U.S. at 244. M.C. did not state, as the prosecutor suggested, that her Christian faith would make it difficult for her to judge Ali. She quite clearly indicated that jury service did not qualify as the type of "judging" that would conflict with her religious beliefs.

Moreover, M.C.'s statements about her Christian faith were elicited by the defense attorney. Although the prosecutor subsequently questioned M.C. at length, he did not ask a single question about her religious views or the implications of those views. This failure to inquire makes the mischaracterization of M.C.'s "Christian faith" response all the more indicative of pretext. For, as in *Miller-El*,

> "[p]erhaps [the prosecutor] misunderstood, but unless he had an ulterior reason for keeping [the juror] off the jury we think he would have . . . cleared up any misunderstanding by asking further questions. . . ." *Id.* at 244.

Third, although the district court relied on a comparison of M.C. with potential juror Marck in upholding the prosecutor's "Christian faith" rationale, that comparison in fact provides no support for the religion justification. Marck identified herself as a practicing Buddhist. When asked about her religious beliefs, Marck stated that they would not interfere with her ability to judge Ali because his case was not a capital case. Noting that

the prosecutor struck Marck, the district court concluded that the "prosecutor's concern with the effect of religious beliefs on a juror's ability to remain objective was equally applied to minority and non-minority jurors."

Marck's voir dire was different from M.C.'s, however, in two important respects. First, Marck did, in fact, indicate that her religious beliefs would affect her ability to sit as a juror under certain circumstances—i.e., in capital cases. M.C., on the other hand, clearly stated that her religious beliefs could not conflict with jury service under any circumstances because the word "judging" "mean[s] something totally different" in the context of jury service. Although Ali's murder trial was not a capital trial, the prosecutor could reasonably have had qualms about a potential juror who admitted that she could not vote in favor of the prosecution in certain circumstances for religious reasons. M.C., however, did not qualify her ability to judge a criminal case in any way.

[17] Second, Marck, like M.C., explained the effect that her Buddhist beliefs would have on her ability to judge Ali in an exchange with defense counsel. Unlike in M.C.'s case, the prosecutor asked Marck follow-up questions about her religious beliefs. thus, when the prosecutor was concerned about a juror's religious views, he specifically asked about them. His failure to do so in M.C.'s interview indicates that he did not think the issue was a significant one in her case. *See Miller-El*, 545 U.S. at 244 ("[W]e expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.") (internal quotation marks and citations omitted).

This conclusion is confirmed by the prosecutor's failure to ask follow-up questions of Juror 3, who identified himself as a Jehovah's Witness and was not struck. When asked by defense counsel how his "spiritual practice" might affect his ability to serve as a juror, Juror 3 stated, "I don't believe [it would.] I believe I can fairly and impartially consider whatever

testimony and evidence would be presented and make a judgment based on that, regardless of background and my involvement." These statements are arguably more equivocal than M.C.'s unqualified statement that she would be able to engage in the type of judging required of a juror. Yet, as in M.C.'s case, the prosecutor did not ask Juror 3 any questions about religious beliefs. This parallel further confirms that M.C.'s religious views were not a cause of concern to the prosecutor.

4. Conclusion—M.C.

[18] In sum, an analysis of the "totality of the relevant facts," including a comparison of M.C. to other potential and actual jurors, convincingly refutes each of the prosecutor's non-racial justifications for his peremptory challenge of M.C. We are therefore "compell[ed] [to conclude] that his actual and only reason for striking [M.C.] was her race." *Kesser*, 465 F.3d at 360. Moreover, "the California courts, by failing to consider comparative evidence in the record before it that undeniably contradicted the prosecutor's purported motivations, unreasonably accepted his nonracial motives as genuine." *Id.* at 358. In so doing, the California appellate court, like the district court, reached a conclusion regarding the prosecutor's intent that was not only incorrect, but unreasonable. *See Miller-El*, 545 U.S. at 266.

B. The Prosecutor's Challenge of Juror Darrell Jefferson

[19] "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder*, 128 S.Ct. at 1208 (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)). As the record compels a finding that the prosecutor's removal of M.C. was racially motivated, we need not evaluate the validity of the prosecutor's peremptory challenge of Darrell Jefferson. We do so briefly, however, because the weakness of at least two of the prosecutor's justifications for challenging

Jefferson lends further support to our conclusion that M.C.'s strike was racially motivated.

The prosecutor stated that he struck Jefferson because (1) he feared that Jefferson would "over-intellectualize" the decision-making process; (2) Jefferson had provided a "smart-ass" answer to one of his questions; (3) Jefferson exhibited a casual attitude; and (4) Jefferson had discussed criminal cases with his brother, whom the prosecutor mistakenly believed to be a criminal defense attorney.

The prosecutor's first justification is highly questionable. During voir dire, Ali's attorney asked Jefferson if he would be able to keep an open mind throughout a multi-week trial and not decide the case until he deliberated with other jurors. Jefferson responded in the following way:

> JEFFERSON: Can I rephrase the statement?
>
> DEFENSE: Absolutely.
>
> JEFFERSON: I think I would be able to continuously evaluate, but the way I think people work is—I mean, you make decisions and then you change them and then you change them. That's the way as things are presented to you.
>
> DEFENSE: As you sit here today, if you're chosen to be a juror, you think that you would do that?
>
> JEFFERSON: Yes. Continuously evaluate.
>
> DEFENSE: So you may decide on Monday, looks like he is guilty, and then hear a little bit more testimony, and on Tuesday, then change my mind, well, he is not guilty, and then go back and forth in that manner.
>
> JEFFERSON: Yes, probably.

The prosecutor cited the above exchange as evidence that Jefferson would "over-intellectualize"

the decision-making process and would not keep an open mind during the trial. The State makes this argument again on appeal, noting that California's standard jury instructions inform jurors that they are not to decide an issue until the case has been submitted. *See* CALJIC No. 0.50.[7]

[20] As the trial judge pointed out, however, Jefferson's willingness constantly to re-evaluate his position is evidence of open-mindedness, not closed-mindedness. In addition, Jefferson's statements are likely an accurate assessment of the natural decision-making process and do not indicate an unwillingness to follow the law. The prosecutor's characterization of Jefferson's statements as demonstrating an unwillingness to keep an open mind is therefore dubious, and, in turn, raises doubts about the legitimacy of his first reason for striking Jefferson.[8]

[21] The prosecutor's third justification for removing Jefferson, Jefferson's alleged "casualness," is likewise weak. *See Kesser*, 465 F.3d at 364 (noting that the prosecutor's rationale for striking a potential juror, that the juror was "emotional about the

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[7] CALJIC No. 0.50 reads in relevant part: "During the course of this trial and before you begin your deliberations, you must keep an open mind on this case and upon all of the issues that you will be asked to decide. In other words, you must not form or express any opinions on this case until the matter is finally submitted to you."

[8] Ali argues that a comparative juror analysis also supports a finding that the prosecutor's "over-intellectualizing" justification is pretextual. More specifically, Ali argues that the prosecutor failed to strike a number of jurors who exhibited "intellectual proclivities," including one juror who stated that he was "trained in logical thinking." A comparative juror analysis is not useful with respect to this justification, however. The prosecutor's alleged reason for striking Jefferson was not that Jefferson was too intellectual in general, but that he would "over-intellectualize" the decisionmaking process. No other seated or potential juror discussed his or her decisionmaking processes. As a result, it is not possible to compare Jefferson to other jurors with respect to this issue.

system," was "so underdeveloped that it likely falls short of *Batson*'s mandate for a 'clear and reasonably specific' explanation of the legitimate reasons for exercising the challenges.") (alteration omitted). Although Jefferson joked with the court on a couple of occasions, his lengthy voir dire indicates that he was a thoughtful individual who would have taken the trial seriously. The trial court itself noted that "given [Mr. Jefferson's] thoughtful answers, his demeanor, his background, . . . [h]e, from this perspective, would have been an excellent juror." Moreover, the trial judge joked with a number of seated jurors during voir dire and acknowledged that he had made efforts to "keep things reasonably open and not too tense so that the jurors would be more apt to answer truthfully and expose their feelings about various matters if they felt they were comfortable." So, to the extent that Jefferson did engage in "lighthearted banter," it was with the encouragement of the trial court.

The prosecutor also failed to explain why a casual or light-hearted demeanor would render Jefferson unfit for jury service. Like the "emotional about the system" justification offered by the prosecutor in *Kesser*, the prosecutor's "casualness" rationale is "so underdeveloped that it likely falls short of *Batson* mandate for a 'clear and reasonably specific' explanation of the legitimate reasons for exercising the challenges." *Kesser*, 465 F.3d at 364 (alteration omitted); *see also id.* ("Even if the prosecutor could establish that [the struck juror] was unusually pretentious about her work, he offered no explanation about how this would render her unsuitable for the jury."). It also seems to contradict the prosecutor's alleged concern that Jefferson would "over-intellectualize" the decisionmaking process.

Although two of the prosecutor's justifications for challenging Jefferson are exceedingly weak, we acknowledge that his other two reasons for removing Jefferson find some support in the record. Jefferson twice responded to questions from the prosecutor with answers that the prosecutor credibly could have

viewed as sarcastic or hostile. Ali does not identify a single unchallenged juror who made similar remarks.

The prosecutor's concern about Jefferson's close relationship with a criminal defense attorney also appears to be credible. Jefferson asserted during his voir dire that his brother was an attorney who had represented the defendants in two criminal cases that were heard by the Supreme Court. Jefferson also acknowledged that he had discussed the cases with his brother at length. Although the relevant cases involving Jefferson's brother were, in fact, civil cases and Jefferson's brother was not a criminal defense attorney, it was reasonable for the prosecutor to rely on the information that Jefferson provided during his voir dire.

A comparative juror analysis also reveals that Jefferson's exposure to the legal system through his brother was unique among the jurors. Two unchallenged jurors had relatives who were practicing attorneys, but both of these jurors stated that they did not discuss cases with these relatives. The record therefore substantiates the prosecutor's contention that he struck Jefferson because of a concern about Jefferson's asserted connection to a criminal defense attorney.

Overall, the validity of the prosecutor's decision to challenge Jefferson is a close question. Two of the prosecutor's proffered explanations for the strike are entirely unconvincing, while the two others could be legitimate. If Jefferson had been the only African-American juror that the prosecutor struck, we might well affirm the district court's denial of Ali's petition.

[22] But Jefferson was not the only African-American the prosecutor peremptorily challenged. He also struck the only other African-American potential juror, and, in so doing, provided several pretextual explanations for that strike. In light of this additional strike, the prosecutor's proffer of two questionable explanations for his strike of Jefferson take on a significance that they might otherwise lack. *See Lewis v. Lewis*, 321 F.3d 824, 831 (9th Cir. 2003) ("The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine

the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge."). At a minimum, these dubious explanations reaffirm our conclusion that the prosecutor's actual reason for striking M.C. differed from those that he asserted and that his ulterior motive was race-based. *See Kesser*, 465 F.3d at 369 ("The prosecutor's willingness to make up nonracial reasons for striking [three minority jurors] makes it even harder to believe that this reasons for striking [a fourth juror] were race-neutral.").

IV. Conclusion

[23] Taken as a whole, the record compels a finding that the prosecutor's non-race based reasons for peremptorily striking M.C. were pretexts. The fact that the prosecutor peremptorily struck the only other African-American juror in the jury pool and provided at least two implausible reasons for that challenge reinforces this conclusion. We therefore hold that both the California Court of Appeal and the district court clearly erred when they found that Ali failed to establish purposeful discrimination. We further hold that, in light of the overwhelming evidence indicating that the prosecutor in Ali's case acted with discriminatory intent when he struck M.C., the California appellate court's finding to the contrary was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *See* 28 U.S.C. § 2254(d)(2). We therefore reverse the judgment of the district court and remand with directions to issue a conditional writ of habeas corpus requiring Ali's release from custody, unless the State elects to retry Ali within a reasonable time to be determined by the district court.

REVERSED and REMANDED.

Filed August 24, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

MOHAMMED HAROON ALI,
Petitioner,

v.

RODERICK G. HICKMAN, Director
California Department of Corrections,
Respondent.

No. C 05-5243 PJH

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS

(Docket No. 25)

Before the court is the petition for writ of habeas corpus filed by state prisoner, Mohammed Haroon Ali ("Ali") pursuant to 28 U.S.C. § 2254. Having reviewed the parties' papers, the record, and having carefully considered their arguments and relevant legal authorities, the court DENIES the petition.

BACKGROUND

I. Procedural History

In 2001, a jury convicted Ali of first-degree murder in the San Mateo County Superior Court. Ali had two prior felony convictions, and at the time of his murder conviction, he was on probation for aggravated kidnapping.

At a hearing on May 5, 2001, the trial court found the allegations regarding his prior offenses to be true, that one of them constituted a "strike," and that Ali had violated his probation. On August 13, 2001, the trial court sentenced Ali to an aggregate

sentence of fifty-five years to life in prison. In addition, the trial court revoked Ali's probation and reimposed the nine-year sentence from his prior aggravated kidnapping conviction.

The California Court of Appeal denied Ali's direct appeal and his petition for state habeas relief on January 30, 2004. The California Supreme Court then denied review on May 12, 2004, and denied his habeas petition on January 19, 2005. Ali filed the instant federal habeas petition on December 19, 2005.

I. Factual History

Ali's conviction arose from the following facts. A more extensive summary may be found in the state appellate court's January 30, 2004 decision. See Record Exh. 11.

Ali and the victim, Tracey Biletnikoff ("Tracey" or "Biletnikoff"), dated in late 1998 and early 1999. Both had histories of drug abuse. Ali had successfully completed a drug rehabilitation program at Project 90 in San Mateo, California, and was an adolescent counselor at Project 90 beginning in January 1999.

Two days prior to Biletnikoff's murder, Ali had relapsed and spent a night binging on alcohol and crack cocaine. On Monday, February 13, 1999, the day of the murder, Ali confessed his relapse to Tracey and others at Project 90. However, the evidence suggested that he was not under the influence of drugs or alcohol at that time.

Trial witnesses had different perspectives on the couple's relationship, but several testified that Biletnikoff was ambivalent about her relationship with Ali and intended to end it. About three weeks before her death, Biletnikoff told her stepmother she was "tired of being the caregiver" and tired of Ali's threats to go back on drugs if she left him. On the day she was killed, Biletnikoff told her best friend that she was breaking up with Ali that day. However, there was also evidence that the couple had consensual sex within 72 hours of the homicide, and Tracey and Ali were seen touching affectionately hours before her death.

As a result of his relapse, Ali faced severe consequences. He would lose his position as adolescent counselor and would need to restart the rehabilitation program in order to remain at Project 90. Additionally, he was on probation for prior offenses and was scheduled for a drug test the next day; if he failed the drug test, then his nine-year prison sentence could be reinstated. Ali, an East Indian citizen of Fiji, was also facing deportation proceedings related to his prior conviction.

At 5:00 p.m. on February 13, 1999, Biletnikoff left Ali at Project 90 to attend her own recovery meeting. Soon after, Ali went to a bus stop, where one of the Project 90 counselors found him and convinced him to attend a recovery meeting. Biletnikoff returned to Project 90 at 8:00 p.m. Witnesses testified that Biletnikoff was worried about Ali and his demands to use her car, and friends advised her not to lend him the car. Biletnikoff went to talk to Ali in his office while others attended a meeting. During Ali's subsequent confession to the police, he stated that he and Biletnikoff began to argue, which escalated into a physical confrontation. Tracey allegedly blocked Ali's exit from the office and hit him. She also called him a "loser" and compared him to her ex-boyfriend, who had relapsed and never recovered. Ali grabbed Tracey by the neck and strangled her with his hands until she fell to the ground, at which point "white stuff" came from her mouth. He then choked her with his T-shirt. Forensic evidence indicated that Biletnikoff was still alive when Ali began to strangle her with his T-shirt. Biletnikoff's body also showed other signs of violence. Her face was bruised and scraped in multiple areas around her forehead, nose, and mouth from the application of blunt force.

After killing Tracey, Ali drove one of the Project 90 vans to the back door of his office and loaded her body into the front seat. He first drove home, where he changed his clothes and talked to his nephew. Family members testified that they saw no visible signs that Ali had been in a fight. Ali confessed to his nephew that he had killed Tracey, although Ali told

him initially that he had accidentally killed her by a blow to the face with his elbow. Ali also told his nephew he did not want to go to back to jail and asked him for money. Ali then drove Tracey's body to Cañada College in Redwood City, California, where he rolled her body down a steep hillside. Ali returned to Project 90 and fled in Tracey's car to Mexico.

Ali was apprehended the following night, when he crossed the border from Mexico back into California. While in police custody, Ali confessed to killing Tracey Biletnikoff, but gave inconsistent accounts as to how he gained possession of Biletnikoff's car keys. He first asserted that he grabbed them from her during their confrontation, but then claimed that he searched her clothing for the keys after she had died.

At trial, the prosecution introduced evidence of Ali's 1994 conviction for the kidnapping of his then-girlfriend, Daisy Chandra. Chandra testified that Ali had kidnapped her, threatened to kill her, and accosted her at knife point in the past.

ISSUES

Ali raises the following claims for relief in his federal habeas petition:

> 1) that his constitutional rights were violated by the prosecutor's racially discriminatory use of peremptory challenges;
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> 2) that the trial court's manslaughter jury instruction violated his due process and fair trial rights;
>
> 3) that trial counsel was ineffective in failing to object to the trial court's manslaughter jury instruction and the prosecution's related closing argument;
>
> 4) that the introduction of propensity evidence violated his due process and fair trial rights; and

5) that the propensity evidence jury instruction given by the trial court violated his due process rights.[1]

STANDARD OF REVIEW

The petition in this case was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), so the provisions of that act apply. See Lindh v. Murphy, 521 U.S. 320, 327 (1997). Under AEDPA, a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the

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[1] In his petition, Ali appears to have mistakenly framed this last claim as an issue of ineffective assistance of counsel. See Petition at 24 ("The judgment of commitment rendered against the Petitioner is invalid, and his consequent detention is unlawful, because he was deprived of effective assistance of counsel guaranteed him by the Fifth, Sixth, and Fourteenth Amendments . . . because the pattern jury instructions regarding the use of propensity evidence permitted the jury to convict Petitioner of the charged crime even if the prosecution failed to prove Petitioner's guilt 'beyond a reasonable doubt.'"). However, the claim that Ali presented to the state appellate court, that the State has addressed in its opposition, and that Ali has replied to in his traverse, is actually a due process claim. See Exh. 12 at 30 (arguing in petition for review to California Supreme Court that the trial court's instruction pursuant to CALJIC 2.50.02 violated Ali's due process rights); Oppos. at 32-33; Traverse at 63. Accordingly, this court will address the claim as one based on a due process violation as opposed to a denial of effective assistance of counsel, as originally stated in Ali's habeas petition filed with this court.

facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

A state court decision is "contrary to" Supreme Court authority, and therefore falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite that reached by the [Supreme] Court on a question of law, or if the state court decided a case differently than the [Supreme Court] has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412 (2000). "Clearly established federal law" under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. Lockyer v. Andrade, 538 U.S. 63, 75 (2003). This "clearly established" law refers to the holdings, as opposed to the dicta, of [Supreme] Court decisions as of the time of the relevant state court decision. Id.

Under the "unreasonable application" clause of § 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing principle from the [Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Id. at 74. However, this standard requires the state court decision to be more than incorrect or erroneous. Id. For the federal court to grant habeas relief, the state court's application of the Supreme Court authority must be objectively unreasonable. Id. at 74. The "objectively unreasonable" standard is different from the "clear error" standard in that "the gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." Id. at 75; see Clark v. Murphy, 331 F.3d 1062, 1068 (9th Cir. 2003). Therefore, it is not enough that a habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous. Rather, the habeas court must conclude that the state court's application of federal law was objectively unreasonable. Andrade, 538 U.S. at 75; Clark, 331 F.3d at 1068.

However, when the state court decision does not articulate the rationale for its determination or does

not analyze the claim under federal constitutional law, a review of the court's application of clearly established federal law is not possible. See Delgado v. Lewis, 223 F.3d 976, 981 (9th Cir. 2000); see also 2 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 32.2 at 1424-26 & nn. 7-10 (4th ed. 2001). When confronted with such a decision, a federal court must conduct an independent review of the record and the relevant federal law to determine whether the state court's decision was "contrary to, or involved an unreasonable application of" clearly established federal law. Delgado, 223 F.3d at 981.

> When a state court does not furnish a basis for its reasoning, we have no basis other than the record for knowing whether the state court correctly identified the governing legal principle or was extending the principle into a new context . . . [A]lthough we cannot undertake our review by analyzing the basis for the state court's decision, we can view it through the 'objectively reasonable' lens ground by *Williams* [*v. Taylor*, 529 U.S. 362 (2000)] . . . Federal habeas review is not de novo when the state court does not supply reasoning for its decision, but an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law . . . Only by that examination may we determine whether the state court's decision was objectively reasonable.

Delgado, 223 F.3d at 981.

As for state court findings of fact, under § 2254(d)(2), a federal court may not grant a habeas petition by a state prisoner unless the adjudication of a claim on the merits by a state court resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §

2254(d)(2). The "clearly erroneous" standard of unreasonableness that applies in determining the "unreasonable application" of federal law under § 2254(d)(1) also applies in determining the "unreasonable determination of the facts in light of the evidence" under § 2254(d)(2). See Torres v. Prunty, 223 F.3d 1103, 1107 (9th Cir. 2000). To grant relief under § 2254(d)(2), a federal court must be "left with a firm conviction that the determination made by the state court was wrong and that the one [petitioner] urges was correct." Id. at 1108.

DISCUSSION

I. Ali's Constitutional Rights Were Not Violated by the Prosecution's Use of Peremptory Challenges

Ali claims that the prosecution exercised peremptory challenges to strike two jurors on the basis of race, in violation of Batson v. Kentucky, 476 U.S. 79 (1986).[2]

A. Legal Framework for Batson Challenges

The use of peremptory challenges by either the prosecution or defendant to exclude cognizable

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[2] In his petition, Ali initially asserts that the prosecutor's use of peremptory challenges against two African-American jurors deprived him "of a fair jury trial, due process, and the equal protection of laws guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution." However, in his briefing of the issue before this court, and in his state appellate court briefs and petition for review, he raised the issue solely as a violation of the Equal Protection Clause under Batson. Because Ali has not exhausted this claim to the extent it is based on an alleged violation of his Sixth Amendment right to a fair and impartial jury, or his Fifth and Fourteenth Amendment due process rights, nor has he briefed the issue before this court as such, this court limits its review of the issue as an alleged violation of the Equal Protection Clause under Batson.

groups from a jury may violate the Equal Protection Clause. See Georgia v. McCollum, 505 U.S. 42, 55-56 (1992). The Supreme Court first held that the Equal Protection Clause forbids the challenge of potential jurors solely on account of their race in Batson, 476 U.S. at 89.

Batson permits prompt rulings on objections to peremptory challenges under a three-step process. Id. First, the defendant must make a prima facie case that the prosecutor exercised peremptory challenges on the basis of race "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Id. at 93-94. A party establishes a prima facie case by showing that: (1) the defendant is a member of a cognizable racial group, (2) the group's members have been excluded from the jury, and (3) the circumstances of the case raise an inference that the exclusion was based on race. Id. at 96. A defendant will satisfy the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. Johnson v. California, 545 U.S. 162, 170 (2005).

Second, if a prima facie case is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Batson, 476 U.S. at 97; Wade v. Terhune, 202 F.3d 1190, 1195 (9th Cir. 2000). "[T]he prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." Batson, 476 U.S. at 98 n. 20. Reasons must be "related to the particular case to be tried." Id. at 98. The prosecutor's explanation need not be persuasive; unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. See Purkett v. Elem, 514 U.S. 765, 768-69 (1995).

Third and finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. Batson, 476 U.S. at 98; Wade, 202 F.3d at 1195. To fulfill its duty, the court must evaluate the prosecutor's proffered reasons and credibility under the totality of

the relevant facts, using all the available tools, including its own observations and the assistance of counsel. Mitleider v. Hall, 391 F.3d 1039, 1047 (9th Cir. 2004); Lewis v. Lewis, 321 F.3d 824, 831 (9th Cir. 2003). Comparative juror analysis, discussed in more detail below, involves determining whether non-challenged jurors possess any of the characteristics on which the prosecution challenged jurors in the protected group, and may tend to prove discrimination at the third Batson step. Miller-El v. Dretke, 545 U.S. 231, 242-43 (2005); Kesser v. Cambra, 465 F.3d 351, 360 (9th Cir. 2006); Sims v. Brown, 425 F.3d 560, 577 (9th Cir.), amended, 430 F.3d 1220 (9th Cir. 2005); United States v. You, 382 F.3d 958, 968-69 (9th Cir. 2004).

B. Factual Background

During trial, Ali's counsel made a Batson/Wheeler motion when the prosecutor used his peremptory challenges to strike the only two African-American jurors in the venire, Marcelline Combs and Darrell Jefferson. Batson, 476 U.S. at 89; see also People v. Wheeler, 22 Cal.3d 258 (1978). The trial court found a prima facie case of discrimination, and required the prosecutor to set forth his reasons for excusing the two jurors. Batson, 476 U.S. at 89.

The prosecutor first explained that he excused Combs based on her equivocal statements regarding an incident of molestation in her family. Augmentation to Reporter's Transcript ("ART") at 790, People v. Ali, San Mateo County Super. Ct. (No. SCO46199A); see also Exh. 4. Combs had indicated on her jury questionnaire that her stepson had attempted to molest her daughter. ART 250. Her stepson was subsequently arrested and taken to juvenile hall, and eventually placed on probation. ART 251-52. The prosecutor specifically took issue with Combs' response to a question regarding whether the attempted molestation would have any ramifications on the case at hand. Combs responded that she "really [didn't] think – I don't think it would have any bearing. I don't know. I don't think it would." ART 252. Additionally, the prosecutor also

expressed concern about Combs' involvement in the criminal justice system as a result of the molestation incident.[3]

Second, the prosecutor explained that he excused Combs because she had indicated that the demeanor and professionalism of the attorneys would affect her opinion of the trial. During voir dire, the prosecutor asked Combs about her impressions of attorneys and what she believed they would be willing to do for their clients. ART 398. In her response, Combs stated that she hoped the attorneys would act professionally. ART 398. She also stated that she would not penalize the attorneys if they had to engage in aggressive questioning of a witness as long as they kept it professional and respectful. ART 398.

Finally, the prosecutor asserted that Combs' Christian faith might interfere with her ability to judge Ali. Combs had indicated on her juror questionnaire that she regularly attended church. Also, during voir dire, when defense counsel inquired about the effect of her spiritual practice on the present case, Combs took a moment to think before answering that it would not affect her ability as a juror. ART 400. However, when questioned about her initial hesitancy, Combs stated there was a distinction between judging in the position of a juror and judging as a Christian, and then confirmed that her religion would not affect her ability to be objective as a juror. ART 400.

The prosecutor then offered four reasons for challenging the other juror at issue, Darrell Jefferson. First, he was concerned that Jefferson would "over-intellectualize" the case, and the prosecutor was looking for jurors who could keep an open mind until the close of the evidence. ART 792. The prosecutor based this concern on Jefferson's

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[3] Regarding his concern with Combs' experience with the criminal justice system, the prosecutor stated: "It did involve family members within the system. That was, level one, a concern I had." ART 790.

statement during voir dire that people constantly make decisions and then reassess them as new information becomes available. ART 676. Secondly, the prosecutor felt that one of Jefferson's responses had been a "smart-ass answer," which he found offensive. ART 792. This was based on an exchange he had with Jefferson in which one of Jefferson's answers drew laughter from the courtroom. Third, the prosecutor took issue with Jefferson's contact with his brother, a purported "public defender." ART 794. Jefferson stated during voir dire that his brother was a criminal appellate attorney, with whom Jefferson had discussed two criminal cases that his brother had argued before the Supreme Court.[4] ART 676. Finally, the prosecutor also mentioned that Jefferson appeared too casual, something he was not looking for in a juror, but stated that this reason alone would not be grounds for his exercise of a peremptory challenge. ART 794. These four factors together formed the basis for the prosecutor's peremptory challenge of Jefferson.

The trial court reviewed the Batson motion and found Ali had not carried his burden of proving racial discrimination. In reviewing the motion, the trial court stated that "[t]he issue is whether or not the prosecutor's justification or the defendant's justification if the issue were flipped is reasonable." ART 812. The trial court did not, however, make specific findings in denying the motion.

C. State Appellate Court Decision

In reviewing the trial court's decision on the peremptory challenge issue, the state appellate court applied the three-part Batson test. It noted that initially, the trial court had concluded that Ali had not established a prima facie case, but that the trial court had subsequently changed its ruling, found a prima facie showing of group bias, and then asked

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[4] It was unclear which Supreme Court Jefferson was referring to. His brother practices in Texas, so it was likely either the Texas or the United States Supreme Court.

the prosecutor to articulate race-neutral reasons for striking Combs and Jefferson. For purposes of Ali's appeal, the appellate court assumed that the trial court properly found that Ali established a prima facie case at step one, and noted that Ali did not dispute that the prosecutor provided facially race-neutral reasons for his peremptory challenges to Combs and Jefferson.

Turning to the third Batson step, proof of purposeful discrimination, the court of appeal then noted that it would apply a "clearly erroneous" standard of review, identical to the standard utilized by the United States Supreme Court in reviewing a state court's finding on the issue of discriminatory intent. It found no error in the trial court's determination that Ali failed to show purposeful discrimination. In support, the appellate court noted that the trial court had "closely questioned the prosecutor and weighed the proffered explanations" under the correct legal standards. The court of appeal also concluded that state law did not require the trial court to make detailed findings in denying Ali's Batson motion.

As for Combs, the state appellate court affirmed the trial court's finding of no purposeful discrimination, rejecting Ali's argument that discriminatory intent should have been inferred from the prosecution's alleged reliance on Combs' initial responses while refusing to credit later, less equivocal responses. Turning to Jefferson, the court similarly found that the record was devoid of any evidence that the prosecution possessed a racist attitude toward or distrust for African-Americans.

In affirming the trial court, the state appellate court refused Ali's request to engage in any comparative jury analysis, citing state law for the proposition that an appellate court should not engage in such analysis when it did not occur at the trial court level. See Exh. 11, at 17 n.6 (citing People v. Johnson, 30 Cal.4th 1302, 1325 (2003)).

D. Analysis

Ali's arguments on this issue are two-fold. First, he contends that the state appellate court's failure to engage in comparative juror analysis in and of itself constituted a violation of his constitutional rights under Batson. Second, he argues that comparative juror analysis reveals purposeful discrimination in violation of his Equal Protection rights.

1. Case Law re: Comparative Juror Analysis

The California Court of Appeal decided Ali's case on January 30, 2004, prior to the United States Supreme Court's June 13, 2005 decision in Miller-El. 545 U.S. at 231. In Miller-El, the defendant was charged with capital murder. At defendant's trial, the prosecution used peremptory strikes against ten out of eleven prospective African-American jurors. Id. at 233. The defendant objected that the strikes were based on race, but the Texas trial court denied relief and sentenced defendant to death after the jury convicted him of murder. While the Miller-El defendant's state court appeal was pending, the United States Supreme Court decided Batson, and the Texas appellate court remanded the case to the trial court to determine whether the defendant could show that the prosecution peremptorily struck the African-American jurors based on race under Batson. On remand, the trial court accepted the prosecution's race-neutral reasons for the strikes, and again denied relief.

A federal district court then denied the defendant's request for habeas relief, and the Fifth Circuit subsequently refused to grant a certificate of appealability ("COA"), concluding that the defendant failed to establish a viable constitutional claim. The Supreme Court reversed the Fifth Circuit's denial of a COA, finding that it was at least debatable whether a violation of petitioner's constitutional rights had occurred, and remanded the habeas petition to the Fifth Circuit for consideration on the merits. 537 U.S. 322, 348 (2003). The Fifth Circuit then denied the petition on the merits, and the Supreme Court again

granted certiorari and subsequently considered the merits. 545 U.S. at 231.

The Supreme Court ultimately concluded that the prosecution in Miller-El had engaged in racial discrimination in its exercise of peremptory challenges. The Court used comparative juror analysis for the first time on appeal to determine itself whether the prosecution had been motivated by racial bias in exercising its peremptory strikes. Id. at 239-62. It looked beyond the evidence that Miller-El had presented to the trial court and conducted a comprehensive comparative juror analysis. Id.

At the third Batson step, the Court considered the written and oral statements made by all the prospective jurors and the prosecution's stated reasons for dismissing the African-American jurors in determining whether race played a role in the prosecution's use of its peremptory strikes. Id. The Court concluded that the prosecutor asked different questions of prospective minority jurors than those it asked of prospective non-minority jurors in order to elicit varying responses, which could then justify a peremptory strike on purportedly nonracial grounds. Id. at 260. The Court also found that there was evidence that court procedure permitted the prosecution to "shuffle" juror cards to keep African-American jurors from being drawn, and the record suggested that prosecutors' handbooks used in the jurisdiction recommended racial strikes. Id. at 253-54, 263. In granting relief based on the results of the comparative juror analysis, the Court stated

> [m]ore powerful than the[] bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step.

Id. at 241.

Following the Court's decision in Miller-El, the state and federal courts have considered the role of comparative juror analysis on appeal. In fact, after Miller-El, the Ninth Circuit subsequently amended and withdrew a 2004 decision in which it had held that an appellate court was not required to conduct comparative juror analysis in the first instance on appeal. Boyd v. Newland, 393 F.3d 1008, 1014-15 (9th Cir. 2004), amended by 467 F.3d 1139, 1148 (9th Cir. 2006). In the amended decision, the court held that "after Miller-El, we recognize that our previous reading of Batson was too narrow and that Batson does contemplate a comparative juror analysis on appeal." Id. "The Supreme Court . . . looked beyond the evidence that Miller-El presented to the trial court and conducted a comprehensive comparative juror analysis on appeal." Id. (citing Miller-El, 545 U.S. at 241).

The Boyd court noted that "Miller-El made clear that comparative juror analysis is an important tool that courts should utilize in assessing Batson claims." Id. (quoting Miller-El, 545 U.S. at 240). It rejected the government's argument that any requirement for comparative juror analysis, as established by Miller-El, was barred by Teague v. Lane, 489 U.S. 288 (1989), since Miller-El was decided after the Boyd petitioner's conviction became final. Id. The Ninth Circuit reasoned that Miller-El did not create a new rule of criminal procedure, but simply clarified Batson. Id. at 1146. It further noted that in Miller-El, the Supreme Court applied its holding to Miller-El himself, whose conviction obviously became final prior to the Court's decision. Id. The Boyd court thus held that "if the Supreme Court's endorsement of comparative juror analysis on appeal constituted a new procedural rule, the Court would not have applied that rule to Miller-El, whose case came before the Court on an appeal from a denial of habeas corpus." Id.

The Boyd court nevertheless qualified its holding, adding that "we do not hold that comparative juror analysis always is compelled at the appellate level . . . but comparative juror analysis is

an important tool that courts should use on appeal." Id. at 1148-49 (further stating that "[l]ike the California courts to address the issue, we do not hold that comparative juror analysis is always compelled at the appellate level").

However, in its subsequent decision in Kesser, the Ninth Circuit went farther than it did in Boyd regarding the necessity of comparative juror analysis. 465 F.3d at 351. The defendant/petitioner in Kesser was convicted of first degree murder. During voir dire, the prosecutor struck three Native American women and one Asian woman. Id. at 353. At the defendant's request, the trial court conducted an evidentiary hearing, and required the prosecutor to explain the reasoning behind his strikes. Id. The prosecutor explained that he struck one of the potential Native American jurors because she worked for a tribe and he feared she was "inclined to favor Native American culture and institutions over 'the mainstream system,'" and that "Native Americans were 'resistive' and 'suspicious' of the criminal justice system." Id. at 353-54. He rated that juror a "C" overall, finding her to be "pretentious," "self-important," "somewhat unstable, fairly weak, and some[one] who . . . would be easily swayed by the defense." Id.

Following the prosecutor's explanations, defense counsel expressed particular concern with the above stricken juror, arguing that it represented "classic example of . . . a presumption of a group bias based on a stereotype membership in a racial group . . . ." Id. at 355. The trial court, however, found sufficient justification to support all of the peremptory challenges and held that the juror was dismissed because she worked for a tribe, not because she was a member of the tribe. Id.

The Kesser defendant appealed to the state courts, arguing that the prosecutor struck potential jurors on the basis of their race, in violation of the Equal Protection Clause of the Fourteenth Amendment. The state appellate courts affirmed the trial court, and on federal habeas review, this court denied Kesser relief, concluding that "although the

trial court 'commit[ed] serious error in failing to recognize the bias inherent in one of the prosecutor's purportedly neutral reasons,' the court of appeal acted appropriately in finding that 'race was not the primary reason given by the prosecutor.'" Kesser v. Cambra, 2001 WL 1352607 (N.D. Cal. 2001).

A divided Ninth Circuit panel originally affirmed this decision, but then the court granted a rehearing en banc and reversed. Kesser, 392 F.3d 327 (9th Cir. 2004), reversed by 465 F.3d at 351; 425 F.3d 1230 (9th Cir. 2005) (granting rehearing). The en banc court held that the California Court of Appeal failed "to consider comparative evidence in the record before it [which] undeniably contradicted the prosecutor's purported motivations, [and] unreasonably accepted his nonracial motives as genuine." 465 F.3d at 357.[5] The court reasoned that Batson requires analysis of "'the totality of relevant facts' about a prosecutor's conduct," and it concluded that the "totality of relevant facts" includes the characteristics of the people the prosecutor did not challenge. Id. at 360. The court asserted that "[i]f a prosecutor's proffered reason for striking a [minority] panelist applies just as well to an otherwise-similar [non-minority] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Id. at 361 (quoting Miller-El, 545 U.S. at 241). The Kesser court ultimately concluded that the California courts' findings were not only wrong, but that the courts had engaged in an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Id. at 358 (quoting 28 U.S.C. 2254(d)(2)).

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[5] The Kesser court noted that the California appellate court probably did not engage in comparative juror analysis itself because at the time of the state court's decision, California law did not require comparative juror analysis on appeal. The court, however, suggested that "[t]he California courts may wish to revisit this position in light of Miller-El." 465 F.3d at 360 n. 3.

> The [Supreme] Court in Miller-El applied comparative juror analysis to a case originally tried in 1986, remanded for a Batson hearing in 1988, and appealed under AEDPA in 2000. The Court's holding means that the principles expounded in Miller-El were clearly established Supreme Court law for AEDPA purposes at least by the time of the last reasoned state court decision in Miller-El, handed down in 1992, before Kesser's 1993 trial.

Id. at 360.

The Kesser majority refuted the dissent's argument that it should not engage in comparative juror analysis because the "factual basis" for such analysis had not been presented to the state appellate courts. Id. at 361. The court concluded that "the 'factual basis' for comparative juror analysis is contained in the voir dire, which was submitted to the California Court of Appeal and was part of the evidence presented in the State Court proceeding." Id. It further noted that the Supreme Court reached a similar conclusion in Miller-El, holding that "[t]here can be no question that the transcript of voir dire, recording the evidence on which Miller-El bases his arguments and on which [the Court] base[s] [its] result, was before the state courts." Id. (quoting Miller-El, 545 U.S. at 241 n.2) (asserting that the Miller-El dissent "conflate[d] the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence").

Noting that like the Miller-El Court, it, too, had the voir dire transcripts and juror questionnaires before it, the Kesser court then concluded that comparative juror analysis revealed that the prosecutor's justifications clearly demonstrated racial bias, which was more than sufficient to justify granting the writ on the basis of the comparative juror analysis alone. Id. at 361, 368.

Accordingly, after Kesser, at least in the Ninth Circuit, the requirement that appellate courts engage

in comparative juror analysis, even if such an analysis did not occur at the trial court level, has been determined to be clearly-established Supreme Court law under Miller-El. However, Kesser did not explicitly state that a state appellate court's failure to engage in such analysis is in and of itself an unreasonable application of clearly-established Supreme Court law for purpose of federal habeas review. Nor has the Ninth Circuit articulated which appellate court, on federal habeas review, should perform the comparative juror analysis.[6]

The state courts have similarly struggled with the issue. Prior to the Supreme Court's decision in Miller-El, the California Supreme Court, in the case relied on by the California Court of Appeal in this very case, disapproved of conducting comparative juror analysis for the first time on appeal. See Johnson, 47 Cal.3d at 1220-21. Following Miller-El, unlike the Ninth Circuit, the California Supreme Court has not held that the Supreme Court's decision in Miller-El *requires* comparative jury analysis in the first instance on appeal; instead, the state courts, including the California Supreme Court, have, for the most part, simply gone ahead and, assuming without deciding the issue, conducted such analysis. See People v. Zambrano, 2007 WL 2164057 at *14 (Cal. July 30, 2007); People v. Stevens, 41 Cal.4th 182, 196 (Cal. 2007). The California Supreme Court, however, granted review in a case that will resolve the issue for the state appellate courts. See People v. Lenix, California Supreme Court No. S148029.

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[6] The Ninth Circuit has implicitly addressed these issues in at least two unpublished decisions issued after its decision in Kesser. Review of the unpublished decisions suggests that where the state court fails to engage in comparative juror analysis at the third Batson step, the Ninth Circuit will simply conduct its own comparative juror analysis, and that if the results of the analysis do not indicate purposeful discrimination, then any failure by the state court to engage in such analysis will be considered harmless.

2. State Appellate Court's Failure to Engage in Comparative Juror Analysis

Here, the state appellate court failed to engage in comparative juror analysis at the time of Ali's appeal because California Supreme Court caselaw discouraged such analysis for the first time on appeal. However, the legal landscape shifted with the United States Supreme Court's decision in Miller-El, and with the Ninth Circuit's decisions in Boyd and Kesser interpreting Miller-El. In fact, as noted in Kesser, the Ninth Circuit concluded that the comparative juror analysis requirement was clearly-established federal law as of 1992, prior to when Ali's conviction became final. Because this court is bound by Ninth Circuit decisions, it must assume for purposes of this federal habeas petition that the state appellate court's failure to conduct a comparative juror analysis at step three of its Batson analysis was contrary to clearly established federal law.

However, that in and of itself does not entitle Ali to relief on this claim. The United States Supreme Court recently confirmed that "when a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law," this court "must then resolve the claim without the deference that AEDPA otherwise requires." Panetti v. Quarterman, 127 S.Ct. 2842, 2858 (June 28, 2007). Accordingly, this court is not required to grant relief, but instead reviews de novo whether or not Ali has established purposeful discrimination at step three of the Batson test. See id.; see also McCollum v. Papa, 2007 WL 2316345 at *1 (9th Cir. Aug. 14, 2007) (same).[7]

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[7] The court notes that Ali also contends that the state appellate court's decision affirming the trial court was unreasonable because the trial court applied the wrong legal standard in evaluating the prosecution's proffered justifications at step three of the Batson test. However, because this court will review step three de novo, and will apply clearly-established Supreme Court law in evaluating the prosecution's

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It is apparent to this court that the Ninth Circuit's interpretation of Miller-El mandates comparative juror analysis in this case. It is still unclear to the court, though, at which level the comparative juror analysis should take place. For example, should this court grant the writ and remand the case to the state appellate court(s) for purposes of conducting the analysis? Or should the court simply undertake its own comparative juror analysis?

As a practical matter, it appears that the effect of the Ninth Circuit's decision in Kesser will be to require federal district courts, on habeas review, to conduct such analysis in the first instance when the state appellate court decisions occurred prior to Miller-El. As noted, the state appellate courts have only begun engaging in such analysis recently because state law previously discouraged analysis for the first time on appeal. Thus, in many currently pending federal habeas cases, there will have been no such analysis, and it will be incumbent upon either the district court or the Ninth Circuit on appeal to conduct the requisite analysis required by Kesser, assuming that the Ninth Circuit does not instruct district courts to remand the cases to state court for this purpose. In spite of the uncertainty, the court elects to conduct its own comparative juror analysis, and has comprehensively reviewed the juror questionnaires and voir dire transcript, in addition to other portions of the record before it.

3. Comparative Juror Analysis for This Case

As noted, the prosecutor's first reason for striking Combs was based on his concern with her equivocal answers about whether the molestation of her daughter would affect her ability to serve as an objective juror. Although Combs' initial response was somewhat hesitant, her later responses to the prosecutor's questioning about law enforcement's

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reasons, this issue is moot.

handling of the case were positive and unequivocal. ART 252. Combs felt her daughter had been treated with respect by law enforcement. ART 252. Nothing in her answers indicated that Combs might be biased against law enforcement. While the State is correct that the prosecutor is entitled to credit an initial hesitant response despite a juror's later, more affirmative responses, this rationale is not convincing given the unchallenged jurors' responses in this case. See Rice v. Collins, 546 U.S. 333, 342 (2006). The record is replete with examples of other jurors qualifying or even completely changing their answers. ART 92, 164-165, 323, 450, 452, 632, 714, 780, 847. [8] Therefore, comparative juror analysis undermines this particular explanation for the prosecution's challenge to Combs.

However, as part of his first justification, the prosecutor also expressed concern with Combs' involvement in the criminal justice system as a result of the molestation incident. Ali contends that other seated jurors also had incidents of domestic violence, which were more directly tied to the case at hand and also indicated bias. ART 243, 262, 369, 431. However, the prosecutor was more concerned about a potential juror's involvement in the criminal justice system generally rather than with specific incidents of domestic violence. For example, the prosecutor excused another juror, David Whitney, who also had an incident of molestation in his family. ART 66-67. Both Combs and Whitney, had significant experience in their pasts with the criminal justice system as a result of the molestation incidents. This experience with the criminal justice system clearly differentiated Combs (and Whitney) from similarly-situated jurors who were permitted to serve. Neither

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[8] For example, when asked about his ability to listen carefully to the evidence, Trial Juror No. 9 stated: "I would certainly try my best to do that." ART 165. Also, Trial Juror No. 3 responded to a question regarding the effect of Ali's substance abuse on her judgment of the case by stating: "I don't think it would affect my judgment." ART 323.

juror to whom Ali refers, Trial Juror No. 6 nor Trial Juror No. 8, actually filed charges or went through the legal process. [9] Therefore, the prosecutor's concern with a potential juror's, including Combs', involvement in the system was legitimate and consistently applied without apparent discriminatory purpose.

As noted, the prosecutor's second reason for Combs' excusal concerned her attitudes regarding the attorneys' professionalism and conduct in the courtroom. Contrary to the prosecutor's statement in connection with the Batson motion, Combs never stated that the level of professionalism would "affect" her. Additionally, the record demonstrates Trial Juror No. 1 had similar expectations of professionalism and was seated without challenge. ART 431-32. The prosecutor himself gave a short speech about the level of professionalism the attorneys would maintain during the trial, thus suggesting that this expectation was not unreasonable or particularly relevant to Combs' ability as a juror. ART 201. Thus, comparative juror analysis fails to support the prosecutor's justification on this point as well.

The prosecutor's final justification was that Combs' Christian faith would interfere with her ability to judge Ali. Initially, it is worth noting that the prosecutor misstated Combs' response. He restated her answer as affirmatively stating that she would have a problem with judging. ART 791. However, Combs never explicitly indicated that her religion would affect her ability as a juror, but rather pointed out the distinction between the types of judging as evidence that her roles as a juror and as a Christian would not conflict. Furthermore, contrary

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[9] Trial Juror No. 8 responded to a question regarding her friend, a victim of domestic violence, with "I cannot say that would not be part of my opinion in my thought process." ART 430. Defense counsel then asked ". . .[F]rom what I'm hearing, there may be a bit of bias if you sat as a juror on this case, is that correct?", to which she replied, "That's correct." ART 431.

to the prosecutor's statement, it was not through defense counsel's questioning that Combs drew this distinction, but rather through her own personal reflection. ART 400.

Nevertheless, as compared to other similarly-situated unchallenged jurors, Combs' reflections on her religion's impact on her judgment as a juror did indicate some hesitancy on her part. Ali points to another juror questioned on his religion, Alternate Juror No. 3, as expressing similar views to Combs on the issue of judgment and religion. However, this juror did not raise any questions about judgment; rather, he simply responded that he didn't believe his religion would interfere. Furthermore, the court notes that the prosecutor exercised a peremptory challenge on another juror, Ms. Marck, who, like Combs, stated that her Buddhist religion would not affect her abilities to judge Ali. ART 308. Thus, the prosecutor's concern with the effect of religious beliefs on a juror's ability to remain objective was equally applied to minority and non-minority jurors, and does not demonstrate racial discrimination. ". . . [C]ounsel is entitled to exercise his full professional judgment in pursuing his client's legitimate interest in using peremptory challenges. . ." Burks v. Borg, 27 F.3d 1424, 1429 (9th Cir. 1994) (quoting J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994)).

On balance, comparative juror analysis calls into question two of the prosecutor's proffered justifications, including Combs' alleged equivocal statements about the incident of molestation in her family and her concern with the professionalism of the attorneys. However, the other two justifications, Combs' involvement in the criminal justice system and the impact of religion on her judgment, were equally applied to other unchallenged nonminority jurors, and therefore support a finding that the prosecutor's use of a peremptory strike as to Combs was race-neutral.

Turning to the other juror at issue, as noted, the prosecutor's first justification for striking Darrell Jefferson was his concern that Jefferson would "over-intellectualize" the case. Ali points to several seated

jurors who also displayed "intellectual proclivities" during the course of voir dire. However, the prosecutor's concern with Jefferson is more appropriately characterized as involving Jefferson's ability to withhold judgment until the close of the evidence than his intellectualism.[10]

Though a juror's professed decisionmaking process is a subjective factor, it "may play a legitimate role in the exercise of challenges." Id. at 1429. While Jefferson's response during voir dire regarding the decisionmaking process and assessment of information was a very thoughtful and realistic reflection on human nature, it also suggested that he may not wait until all the evidence had been submitted before rendering a judgment. ART 700. Maintaining an open mind was a point the prosecution emphasized consistently throughout the course of voir dire with multiple prospective jurors.[11] Also, the prosecution exercised a peremptory challenge on a Caucasian juror, David Whitney, whom the trial judge similarly characterized as "independent minded." ART 812. Thus, comparative juror analysis demonstrates this justification was racially neutral.

The prosecution's second justification involved Jefferson's "smart-ass" response to one of the prosecutor's questions. This can be analyzed together with his comment that Jefferson was too casual, as

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[10] The prosecutor remarked as follows regarding Jefferson's potential to "overintellectualize": "I want jurors, what I think Mr. Morales [Ali's defense counsel] was striving for with him, about keeping an open mind until the end and not making decisions." ART 793.

[11] Some examples include the prosecutor's questioning of Trial Juror No. 4 about being "open-minded" about psychiatric testimony (ART 222); his statement that "[w]e're exploring to find out if anybody has opinions that could keep them from fairly listening to the evidence. . ." (ART 290); and his statement to Mr. Moura, another potential juror, that the judge will instruct them: "Don't arrive at a quick decision, keep an open mind." ART 319.

both reflect on Jefferson's demeanor and attitude, a legitimate basis for exercising a peremptory strike. Id. As Ali points out, the phrasing of the prosecutor's question could have indicated that he had felt Jefferson had indicated bias during the course of voir dire. Although Jefferson may have been justified in asserting that he would not be biased, it was credible that the prosecutor interpreted his response as offensive or "smart-ass." "[P]eremptories are often the subject of instinct," and it is possible that this exchange led the prosecutor to believe Jefferson was biased against him by joking at his expense. Miller-El, 545 U.S. at 252. Ali fails to point to another juror, seated without challenge, who could be compared to Jefferson in this respect, except to contend that defense counsel also drew some laughter from the jury at his expense.

Finally, the prosecutor cited Jefferson's relationship with his brother, a "public defender," as a cause for concern. Ali notes that Trial Juror No. 2, who was seated without challenge from the prosecution, had an uncle in Georgia who was also a public defender. However, Jefferson demonstrated more familiarity with his brother's work and claimed to have discussed two criminal defense cases with him. ART 676. In comparison, Trial Juror No. 2 indicated that she had never talked to her uncle about the cases he was involved in and talked to him rarely in general. ART 661. Thus, there is a wide disparity between Jefferson and Juror No. 2 in terms of their interaction with and knowledge of the criminal justice system.

Ali also makes much of the fact that Jefferson's brother is not actually involved in criminal defense but rather does civil appellate work. However, Jefferson represented during questioning that the cases he had discussed with his brother had been criminal cases before the Supreme Court. Accurate or not, this is the information that was available to the prosecutor at the time of the Batson/Wheeler motion. The prosecutor did represent that he had some outside knowledge of Jefferson's brother as a criminal defense attorney due to the publicity

surrounding his appointment to the Texas Supreme Court, which ultimately turned out to be incorrect. However, the record supports the prosecutor's belief that Jefferson had experience with criminal defense through his brother.

4. Conclusion

Having reviewed the record de novo and having conducted a comparative juror analysis, the court finds that the evidence of racial discrimination pales in comparison to that in Miller-El and Kesser. In Miller-El, the evidence of discrimination was bolstered by instances of jury shuffling and disparate questioning between minority and non-minority jurors, in addition to the concerns raised by the comparative juror analysis in that case. Miller-El, 545 U.S. at 231. There, the prosecution used peremptory strikes against 10 of 11 prospective African-American jurors. Id. at 233. Comparative juror analysis revealed that the prosecution's justifications were not applied equally to non-minority jurors. Id. The prosecution also shuffled the jury twice, moving African-American jurors to the back of the jury pool. Finally, the prosecutor posed different questions to African-American jurors, using more graphic terms before asking their opinion on the death penalty. Id.

Similarly, in Kesser, some of the prosecutor's justifications themselves were barely facially neutral as they were tinged with racial stereotyping against Native Americans and closely tied to race. Kesser, 465 F.3d at 351. When proffering his justifications, the prosecutor used blatant racial and cultural stereotypes. Id. at 357. He identified the challenged jurors by their skin color and stated that he challenged them due to his experience with Native Americans as resistant to mainstream culture and suspicious of the criminal justice system. Id. The prosecutor was also concerned that the prospective jurors may be tolerant of child molestation because of their association with the Native American tribe. Id. When analyzed by comparative juror analysis, the prosecutor's justifications clearly demonstrated racial bias, which was more than sufficient to justify

granting the writ on the basis of the comparative juror analysis alone. Id.

In contrast, no such evidence is present in this case. While the instant comparative juror analysis does reveal some minor faults in the prosecutor's reasoning, the court finds that these faults do not demonstrate racial bias or pretext. The court further finds that the prosecution's race-neutral justifications were sufficiently credible, clear, and reasonably specific. It therefore concludes that based on the totality of relevant facts, Ali has not shown purposeful discrimination at step three of the Batson test.

For these reasons, the court denies habeas relief for this claim.

II. The Special Manslaughter Jury Instructions Did Not Violate Ali's Constitutional Rights

Ali also asserts that his due process rights were violated by the special manslaughter instruction given at his trial, claiming it precluded the jury from convicting him of voluntary manslaughter and reduced the burden of proof required of the State.

At trial, the judge gave the standard instruction defining provocation, CALJIC 8.42, [12] and

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[12] CALJIC 8.42 provides:

> The heat of passion that will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which the defendant was placed and the facts and circumstances that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time. The question to be

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additionally, instructed the jury pursuant to a special instruction proffered by the prosecutor which emphasized that provocation should be judged by an objective standard.

The special instruction, as read to the jury, provided:

> The ordinarily reasonable person of average disposition is measured by an objective standard. Evidence of the defendant's personal characteristics is not relevant as to the determination of the conduct of an ordinarily reasonable person of average disposition.

Reporter's Transcript ("RT") at 3456, People v. Ali, San Mateo County Super. Ct. (No. SCO46199A); see also Exh. 3.

During his closing argument, the prosecutor made the following statements with respect to the special instruction:

> There has to be a heat of passion at the time of the crime that would be aroused in the mind of the ordinarily reasonable person in the same circumstances. The facts of the case must be such that they would provoke the ordinarily reasonable person to attack the victim and inflict fatal injury on the victim. That's what the average ordinarily reasonable person would do. Not the defendant.

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> answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than judgment . . .

CALJIC 8.42; see also Exh. 2 at 48.

RT 3307.

The prosecutor continued to explain that the law did not allow Ali to set up his own standard to excuse or justify the attack. "To go down to this level of manslaughter. . . [the standard is whether] the average, ordinary reasonable person would engage in this conduct when facing those circumstances." RT 3308. The prosecutor also emphasized that the provocation must come from the victim, and cannot be in response to the provocation of third parties. RT 3308.

Additionally, during his closing argument, the prosecutor asserted that the provocation may occur over either a short or long time. He stated that "it must involve an emotion that causes the killer to act from impulse or rashness rather than choice," and that slight provocation is insufficient to reduce the crime to manslaughter. RT 3308.

Further, the prosecutor emphasized that the standard was objective. "It is not the average person who used drugs. [Ali's] personal characteristics. . . [such as being] somebody quick to anger, anything like that, [is] not a factor." RT 3309.

Finally, the prosecutor concluded:

> Because the average, reasonable person, even hearing what [Ali] said was the case, even hearing what he said that she called him some names, that Tracey called him some names and slapped him or punched him, the average, reasonable person is going to strangle? I don't think that's a standard any jury would want to set, and I know you won't do so either. This case is premeditation. This case is deliberation.

RT 3309.

Ali argues that his due process rights were violated by the special instruction because the jury could have interpreted it to mean that in order to find him guilty of manslaughter rather than murder, it would first have to find that the provocation would have induced the same violent act by an ordinarily reasonable person of average disposition. Ali also

challenges the related portions of the prosecutor's closing argument, which he argues misled the jury and prevented it from reaching a verdict of voluntary manslaughter.

On appeal, the California Court of Appeal concluded that the special instruction comported with California law, and thus there was no instructional error. Although the court did not explicitly state that it found the instruction ambiguous, nevertheless it analyzed the instruction under the standard applicable to the analysis of ambiguous instructions. The state appellate court found that the special instruction merely restated a well-settled standard for judging provocation, and was not in error. It held that "[i]t is undisputed that an objective, reasonable person standard applies in judging the adequacy of provocation, and that a defendant's personal characteristics, including intoxication, mental deficiencies, and psychological dysfunctions due to traumatic experiences, are irrelevant to that determination." The appellate court also found that the instruction's reference to "conduct" did not improperly "shift focus" to Ali's actions, but rather restated a principal of law contained in the standard jury instruction, CALJIC 8.42, that a defendant may not set up his own standard of conduct. Thus, it concluded that there was no reasonable likelihood that the jury misunderstood the special instruction.

Additionally, the appellate court found that Ali had waived his right to object to the prosecutor's closing argument due to his failure to object at trial, and that a general attack on the summation was not cognizable on appeal. However, it reviewed portions of the closing argument which were relevant to the jury's potential misunderstanding of the instruction and found that the prosecutor spent little time characterizing the special instruction, and was not inaccurate in doing so. It determined that the prosecutor correctly stressed the objective standard applicable to the law of provocation.

A challenge to a jury instruction solely as an error under state law does not state a claim

cognizable in federal habeas corpus proceedings. See Estelle v. McGuire, 502 U.S. 62, 71-72 (1991). Nor does the fact that a jury instruction was inadequate by Ninth Circuit direct appeal standards mean that a petitioner who relies on such an inadequacy will be entitled to habeas corpus relief from a state court conviction. See Duckett v. Godinez, 67 F.3d 734, 744 (9th Cir. 1995) (citing Estelle, 502 U.S. at 71-72), cert. denied, 517 U.S. 1158 (1996).

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. Estelle, 502 U.S. at 72; Cupp v. Naughten, 414 U.S. 141, 147 (1973); see also Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) ("[I]t must be established not merely that the instruction is undesirable, erroneous or even 'universally condemned,' but that it violated some [constitutional right]."). The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. Estelle, 502 U.S. at 72. In other words, the court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. United States v. Frady, 456 U.S. 152, 169 (1982).

In reviewing an ambiguous instruction, the inquiry is not how reasonable jurors could or would have understood the instruction as a whole; rather, the court must inquire whether there is a "reasonable likelihood" that the jury has applied the challenged instruction in a way that violates the Constitution. Estelle, 502 U.S. at 72 & n.4; Boyde v. California, 494 U.S. 370, 380 (1990); see Ficklin v. Hatcher, 177 F.3d 1147, 1150-51 (9th Cir. 1999) (harmless error when certain that jury did not rely on constitutionally infirm instruction). A determination that there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution establishes only that an error has occurred. See Calderon v. Coleman, 525 U.S. 141, 146 (1998). If an error is found, the court also must

determine whether the error had a substantial and injurious effect or influence in determining the jury's verdict, see Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), before granting relief in a habeas proceedings. See Calderon, 525 U.S. at 146-47; see, e.g., Sarausad v. Porter, 479 F.3d 671, 679 (9th Cir. 2007) (finding reasonable likelihood that jury applied ambiguous instruction on accomplice liability to find petitioner guilty of murder in a way that relieved the State of its burden of proof, and that this error was not harmless).

However, if the disputed instruction is erroneous on its face, the "reasonable likelihood" standard employed for ambiguous jury instructions is not required. Ho v. Carey, 332 F.3d 587, 592 (9th Cir. 2003). For example, if a jury instruction omits a necessary element of the crime, constitutional error has occurred. Id.; see also id. at 593 (finding jury instructions "erroneous" rather than ambiguous, where they included an uncorrected erroneous instruction that second-degree murder could be based on a finding of general intent, but also included an accurate description of the elements of second-degree murder, including specific intent). Actual prejudice is still required before relief may be granted, however. See id. at 595 (citing Brecht, 507 U.S. at 637).

As noted, the California Court of Appeal never explicitly stated whether it considered the instruction to be ambiguous or erroneous. However, since it analyzed the instruction under the "reasonable likelihood standard," see Estelle, 502 U.S. at 72 & n.4, it presumably interpreted the instruction as ambiguous rather than erroneous. Nevertheless, Ali contends that the special instruction was indeed facially erroneous because the reasonable man does not kill, and a standard which requires a reasonable person to act homicidally under the given circumstances is an impossible standard to attain.

His arguments are not persuasive, though, given Ninth Circuit law to the contrary. An example of an erroneous instruction is one which omits a necessary element of the law. Wade v. Calderon, 29 F.3d 1312, 1321 (9th Cir. 1994), overruled on other

grounds, Rohan ex. rel Gates v. Woodford, 334 F.3d 803, 815 (9th Cir. 2003). The special instruction in this case did not omit any element of the homicide charge, and also did not contain any explicit misstatement of the law. Sarausad, 479 F.3d at 690 (concluding that the lack of an explicit misstatement of law in the contested jury instruction rendered it ambiguous rather than erroneous). Furthermore, contrary to Ali's arguments otherwise, the term "conduct" as utilized by the special instruction is ambiguous at best. It could refer to the petitioner's aroused passions in reaction to the particular circumstances, or it could refer to his actions as a result of those passions. Given these dual interpretations, the state appellate court's treatment of the instruction as ambiguous rather than erroneous was not unreasonable.[13]

The California Court of Appeal's conclusion that no instructional error occurred was not unreasonable. As noted, the trial court instructed the jury pursuant to CALJIC 8.42, which states that a defendant may not set up his own standard of conduct and justify or excuse his actions because of personal characteristics. Additionally, the jury was instructed to consider the instructions as a whole and in light of all the others pursuant to CALJIC 1.01. When read

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[13] It is unclear under Ninth Circuit law whether the characterization of a jury instruction as ambiguous constitutes a mixed question of law and fact, or otherwise. Wade, 29 F.3d at 1320 (concluding that the contested instruction was erroneous rather than ambiguous without stating under which section of AEDPA it analyzed the lower court's conclusion); Ho v. Carey, 332 F.3d at 595 (determining that a state appellate court's analysis of an instruction as ambiguous rather than erroneous was incorrect and conducted a de novo analysis without stating the standard for overturning the state court's determination). Given the uncertainty, this court considered this issue in light of the habeas standards applicable to both, and without deciding the standard of review issue, concludes that under any standard – the least deferential and the most deferential standard, Ali is not entitled to relief on this claim.

alongside and in light of CALJIC 8.42, the special instruction merely reemphasized that Ali's personal characteristics were not relevant. The special instruction did not improperly focus the jury's attention on the homicide, but instead emphasized that it was required to consider whether Ali's level of arousal constituted that of an ordinary, reasonable person under the circumstances. Thus, any potential juror confusion regarding the standard of provocation, resulting from the special instruction, would have been resolved by the other instructions provided to the jury.

Additionally, as noted, the appellate court reviewed only the portions of the prosecutor's summation that were relevant to the special instruction, and determined they were not erroneous. The appellate court's decision in this regard was also reasonable. Even if certain portions of the prosecutor's statement relating to the special instruction may have been potentially misleading, they comprised only a small part of the closing argument, and also correctly stated the law in large part. Further, "[a]rguments of counsel generally carry less weight with a jury than do instructions from the court . . . [T]hey are not to be judged as having the same force as an instruction from the court. And arguments of counsel, like the instructions of the court, must be judged in the context in which they are made." Boyde, 494 U.S. at 384. Additionally, the trial judge's instruction to the jury that "if anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow those instructions," reduced the likelihood that the jury blindly followed the law as described by the prosecutor in the closing argument. RT 348.

Moreover, the jury's request for additional copies of jury instructions also suggests that it adequately reviewed the instructions for itself. RT 3490. Given the jury instructions as a whole, the trial court's utilization of the special instruction, in combination with the challenged portions of the

prosecutor's closing argument, did not create a reasonable likelihood that the jury applied the special instruction in a manner that violated Ali's due process rights. Accordingly, the California Court of Appeal's decision was not an objectively unreasonable application of Supreme Court law; nor was it based on an unreasonable determination of the facts. For these reasons, Ali's claim fails.

III. Ali Was Not Denied Effective Assistance of Counsel

On a related note, Ali also contends that his counsel's failure to object to the special instruction and related portions of the prosecutor's closing argument deprived him of effective assistance of counsel as guaranteed by the Sixth Amendment.

Ali asserts that his trial counsel was ineffective in failing to object specifically to the portion of the prosecutor's closing statement in which the prosecutor analogized the deliberation required to establish first-degree murder to "changing lanes on the freeway." The prosecutor used the analogy in an attempt to demonstrate that Ali had deliberated and was not acting in the heat of passion when he killed Biletnikoff. Ali contends that this analogy improperly conflated the definitions of intent and deliberation, which prejudiced the outcome of the trial by reducing the State's burden of proof on the first-degree murder charge.

In his closing argument, the prosecutor defined deliberation as the "careful thought and weighing of considerations for and against the act." ART 3301. He emphasized that the duration of time spent deliberating is not as important as the extent of the reflection. ART 3301. The prosecutor analogized deliberation to driving home on the freeway during rush hour while attempting to switch lanes. He compared a defendant's lack of deliberation to a driver "changing lanes" without looking or thinking about the act. ART 3301. Then, he continued to explain that deliberation is similar to evaluating whether or not to change lanes:

> [Y]ou do what most of us would do, which is, first thing you do is look in your rearview mirror. Any cars coming that way? And then you look in your side mirror, and then you do a quick look over your left shoulder, something that might take three or four seconds at most to do. But you reflect on it. If there is a car coming, you go? No, you can't do it. If there is no car coming, you say okay, I'm safe. That just couple of seconds of reflection. That would mean what we call deliberate. That is a deliberate act. That's why the law tells you time is not the key factor. Premeditation and deliberation.

RT 3301-3302.

Ali raised the ineffective assistance of counsel claim in his petition for writ of habeas corpus before the California Court of Appeal, which issued a "postcard denial," denying review without comment. The California Supreme Court also denied review without comment. Where the state court issues a "postcard denial," this court construes the denial as one on the merits and sufficient for exhaustion purposes. See Greene v. Lambert, 288 F.3d 1081, 1086-87 (9th Cir. 2002). Therefore, this court must conduct an independent review of the record and the relevant federal law to determine whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law." Delgado, 223 F.3d at 982.

In order to prevail on a Sixth Amendment ineffective assistance of counsel claim, a petitioner must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." Id. at 694.

To show that counsel's performance was deficient, a petitioner must demonstrate that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. See id. at 687. The petitioner must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. See id. at 688. The relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. See Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. See Strickland, 466 U.S. at 689.

Second, the petitioner must show that counsel's errors were so serious as to deprive the petitioner of a fair trial, a trial whose result is reliable. Id. at 688. The test for prejudice is not outcome-determinative, i.e., petitioner need not show that the deficient conduct more likely than not altered the outcome of the case; however, a simple showing that the defense was impaired is also not sufficient. Id. at 693. The petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694.

Where the petitioner is challenging his conviction, the appropriate question is "'whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" Id. at 695; see, e.g., Plascencia v. Alameida, 467 F.3d 1190, 1201 (9th Cir. 2006) (ineffective assistance of counsel claim not established because "any prejudicial effect was at best minute" from counsel's failure to object to evidence about existence of a drug in murder

defendant's system where only killer's identity was in dispute); Pirtle v. Morgan, 313 F.3d 1160, 1170-71 (9th Cir. 2002) (finding prejudice where counsel failed to request a diminished capacity instruction, which left the jury with no legal context to evaluate expert testimony about effect of chronic drug abuse on petitioner's ability to premeditate).

A. Deficient Performance

Ali asserts that counsel's failure to object to the special instruction and the prosecutor's related closing argument was not a tactical decision within the range of reasonable trial decisions. As proof, Ali submits a declaration from his defense counsel in which his counsel attests that in hindsight, he did not realize the grave effect of the special instruction and related closing argument on the case, as he had never defended a case with a viable voluntary manslaughter defense. Additionally, Ali provides a declaration from an experienced criminal defense attorney, Philip Barnett, who claims that the San Mateo County District Attorney's office has a history of characterizing the definition of provocation in the manner employed by the prosecution in Ali's case, which Barnett attests he typically rebuts during his closing statement.

However, this evidence fails to demonstrate that Ali's counsel was deficient. The state appellate court concluded that the special instruction was a correct statement of California law. There is no reason to believe that the trial court would have sustained the objection had defense counsel objected to the instruction on due process grounds. The appellate court also found that the prosecutor's characterization of the special instruction in his closing argument was not erroneous, thus also suggesting that any objection would not have been sustained. Counsel's failure to make a fruitless objection is not ineffective assistance of counsel. Rupe v. Wood, 93 F.3d 1434, 1444-45 (9th Cir. 1996).

Additionally, the issue is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable.

See Babbitt, 151 F.3d at 1173. Counsel's decision not to object to the special instruction or the closing argument was not unreasonable, even if in retrospect he might have done things differently. The benefit of hindsight does not establish that Ali's counsel's choices fell outside a range of reasonable conduct. Strickland, 466 U.S. at 689. Accordingly, Ali fails to demonstrate that his attorney's performance was deficient.

B. Prejudice

Having concluded that Ali has not demonstrated deficient performance, the court is not required to address the prejudice prong. Id. at 697. Nevertheless, the court concludes that Ali cannot demonstrate that there is a reasonable likelihood that counsel's failure to object altered the outcome of his trial.

Ali contends that his counsel's failure to object prejudiced him by preventing the jury from convicting him of a lesser crime than first-degree murder. However, even assuming that counsel's failure to object to the prosecutor's special instruction and closing argument was deficient, Ali is unable to show that he was prejudiced as a result.

As previously discussed, use of the special manslaughter jury instruction in combination with the related portions of the prosecutor's closing argument did not violate Ali's due process rights. The jurors had the correct definitions of the various levels of homicide as provided by the jury instructions, which they clearly spent time reviewing as suggested by their request for additional copies. The trial court also gave an instruction, CALJIC 8.50, distinguishing murder from manslaughter, which reminded the jury that it was the State's burden to prove that the victim's death was not the result of heat of passion. It gave an instruction, CALJIC 8.72, advising the jury not to convict Ali of murder if there was doubt whether the killing was murder or manslaughter. Additionally, the jury was instructed pursuant to CALJIC 8.73, which provides that

evidence of provocation could have a bearing on the existence of premeditation and deliberation.

Further, the first-degree murder verdict did not hinge solely on a determination that provocation was inadequate to negate malice aforethought. The jury also needed to find that Ali acted willfully, deliberately and with premeditation pursuant to CALJIC 8.20, or killed during the commission of a robbery pursuant to CALJIC 8.21, none of which were affected or addressed by the special instruction. See, e.g., People v. Thomas, 25 Cal. 2d 880, 899 (Cal. 1945). Because it is well-settled that "juries are presumed to follow their instructions," Zafiro v. United States, 506 U.S. 534 (1993), even if defense counsel had objected to the instruction and had been successful in his objections, it is not reasonably likely that the result would have been different.

Turning to the prosecutor's use of the "changing lanes" metaphor, even if defense counsel had successfully objected to the prosecutor's metaphor, it is not reasonably likely the result would have different. Contrary to Ali's interpretation, the metaphor did not conflate intent to kill with the elements of premeditation and deliberation. At best, the metaphor may have oversimplified the definition of deliberation while emphasizing that no particular amount of time is required to establish premeditation and deliberation, which constituted a correct statement of California law. See Thomas, 25 Cal.2d at 900 ("The true test is not the duration of time as much as it is the extent of the reflection.").

Again, the jurors were informed that any conflict between statements by counsel and the instructions should be resolved in favor of the instructions. RT 348. The instructions correctly defined the elements of first-degree murder, including premeditation and deliberation. CALJIC 8.20 clearly indicated that intent to kill is not equivalent to premeditation and deliberation when committed under the heat of passion, and is not a sufficient basis for a verdict of first-degree murder. The record demonstrates that the jury reviewed the instructions again during deliberations, thus

suggesting it did not rely blindly on statements made during closing arguments. The instructions were clear that the jury should not convict Ali of first-degree murder if it had doubts about whether the murder was first degree or second degree. See, e.g., CALJIC 8.71.

For these reasons, habeas relief on Ali's claim for ineffective assistance of counsel is denied as well.

IV. The Introduction of Propensity Evidence Against Ali Did Not Violate His Due Process Rights

Ali also claims that the introduction of propensity evidence violated his due process and fair jury trial rights. The trial court allowed the prosecution to call Daisy Chandra ("Chandra"), Ali's ex-girlfriend, and an investigating police officer to testify about Ali's prior aggravated kidnapping offense. During her testimony, Chandra described two incidents of kidnapping by Ali, including his physical violence and threats to kill her. She testified that his violence was in response to her ending her relationship with Ali. The trial court admitted the evidence to show intent, as part of the prosecution's theory that Ali reacted violently to rejection from women.

Ali argues that there was no rational basis for admitting propensity evidence in a case such as this one, which he asserts involves domestic violence, because consent was not a defense. Therefore, Ali claims that he was prejudiced by the introduction of evidence of his prior domestic violence offenses. Nevertheless, Ali concedes that the Ninth Circuit recently held in Alberni v. McDaniel that a state appellate decision concluding that the admission of propensity evidence does not violate due process was not objectively unreasonable. 458 F.3d 860, 866 (9th Cir. 2006).

The California Court of Appeal concluded that the propensity evidence regarding Ali's previous misconduct was properly admitted under California

Evidence Code sections 1101 and 1109, and did not violate his due process rights.[14] Further, it found that the trial court did not abuse its discretion under California Evidence Code section 352, which permits the trial court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. In holding that the trial court did not abuse its discretion, the appellate court determined that the trial court's ruling on the prejudice issue reflected careful and sound balancing of the probative value of the evidence.

Additionally, the appellate court concluded that the Chandra evidence was relevant to Ali's premeditation and deliberation, as well as to his intent. It found that the Chandra evidence was highly probative given other evidence suggesting that Biletnikoff intended to end her relationship with Ali, and may have done so shortly before her death. It reasoned that if Ali responded violently to rejection by women, the Chandra evidence was relevant in determining whether his violent response to Biletnikoff was deliberate, as well as to Ali's intent.

The appellate court's decision was reasonable given Ninth Circuit authority on this issue. In Alberni, the defendant/petitioner was charged with murdering his friend. 458 F.3d at 862. At his trial, the prosecution submitted evidence of the petitioner's past violent actions and explosive temper to challenge the defense's theory that the shooting was accidental. Id. at 863. The petitioner argued that the admission of the propensity evidence violated his due

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[14] California Evidence Code § 1101 permits the admission of evidence of prior criminality to prove some fact (i.e. motive, intent, etc.) other than disposition to commit such an act. California Evidence Code § 1109(a) permits the admission of prior acts of domestic violence so long as they are permitted by California Evidence Code § 352.

process rights. Id. The Ninth Circuit held to the contrary. Id. at 866.

Given the Ninth Circuit's recent decision in Alberni, the court concludes that the California Court of Appeal's decision upholding admission of the Chandra evidence was reasonable. Habeas relief on this claim is denied.

V. The Propensity Evidence Instruction Did Not Unlawfully Lessen the Prosecution's Burden of Proof

Ali contends that the 1999 version of CALJIC No. 2.50.02, the instruction regarding propensity evidence, as given by the trial court, violated his due process rights by permitting the jury to find him guilty by a preponderance of the evidence, as opposed to beyond a reasonable doubt. The relevant portion of that instruction provides:

> Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence on one or more occasions other than that charged in the case.
>
> . . . .
>
> If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit other offenses involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. In addition, this evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character. It may also be considered by you for the purpose of determining if it tends to show the existence of intent which is a necessary element of the crime charged or a motive for the commission of the crime charged.

> However, if you find by a preponderance of evidence that the defendant committed a prior offense involving domestic violence, it is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offense. The weight and significance, if any, are for you to decide.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose.

The jury was also instructed pursuant to CALJIC 2.50.2, the instruction defining preponderance of evidence, which states:

> "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find the evidence on any side of an issue preponderates, your finding on that issue must be against the party who has the burden of bringing it. You should consider all the evidence bearing on any issue regardless of who produced it.

The California Court of Appeal denied Ali's claim based on the California Supreme Court's decision in People v. Reliford, 29 Cal. 4th 1007, 1012-16 (Cal. 2003). In Reliford, the California Supreme Court held that the 1999 version of CALJIC 2.50.01, an analogous instruction, did not create a reasonable likelihood that the jury would apply the preponderance of evidence standard instead of the reasonable doubt standard, and therefore the instruction was constitutional.[15] Id. at 1016.

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[15] The language in the contested instruction in the case at hand, CALJIC 2.50.02, and the contested instruction in (continued...)

The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970). Faulty jury instructions justify habeas relief only if the instructions by themselves so infect the entire trial that the resulting conviction violates due process. Estelle, 502 U.S. at 72. The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. Id. The instructions must be more than erroneous; Ali must show a reasonable likelihood that in light of the instructions as a whole, the jury applied the challenged instructions in a way which violated his due process rights. Id.

Ali contends that the 1999 version of CALJIC 2.50.02, as provided at trial, violated his due process rights because the court did not sufficiently instruct the jury that the lower standard of proof used to establish prior domestic violence offenses did not apply to its determination regarding murder, a verdict that must be reached beyond a reasonable doubt. However, Ali recognizes that this court has previously reviewed an analogous instruction, and followed the line of analysis utilized by the California Supreme Court, in concluding that the disputed instruction did not violate a petitioner's due process rights. See Kagel v. Scribner, 2004 WL 1777381 (N.D. Cal., August 6, 2004).

Like the petitioner in Kagel, Ali has similarly failed to show that the state appellate court's determination regarding the jury instructions here was unreasonable. The jury instructions as a whole

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(...continued)
Reliford, CALJIC 2.50.01 is nearly identical. Reliford, 29 Cal. 4th at 1011-12. The only significant difference is that the instruction in Reliford instructed the jury on propensity evidence for prior sex crimes, whereas the contested instruction in the present case deals with domestic violence propensity evidence. Id.

mitigated any possible misinterpretation of the contested instruction. The trial court instructed the jury pursuant to CALJIC 1.01 to consider the instructions as a whole. The trial court also gave CALJIC 2.09, instructing the jury that certain evidence was only to be considered for a limited purpose. The jury was also instructed that Ali must be presumed innocent unless proven guilty beyond a reasonable doubt pursuant to CALJIC 2.90, and the trial court defined reasonable doubt in accordance with CALJIC 2.90.

Moreover, the disputed instruction itself, CALJIC 2.50.02, specifically states that a finding that Ali had committed the previous offenses is not sufficient to prove beyond a reasonable doubt that he committed the charged offense. Finally, the jury was instructed on the elements required to convict of the charged offense, and that proof of each element was required. In light of the accompanying instructions, there was not a reasonable likelihood that the jury applied CALJIC 2.50.02 in such a way that Ali's due process rights were violated. See Estelle, 502 U.S. at 72. Accordingly, the California Court of Appeal's decision was not unreasonable, nor was it an unreasonable application of clearly established Supreme Court precedent. For this reasons, this claim fails as well.

VI. Conditional Request for Evidentiary Hearing

In his petition, Ali asserted a "conditional" request for an evidentiary hearing in the event that this court concludes that his petition should be denied. The State opposes this request in its opposition, arguing that Ali has not shown diligence entitling him to a hearing or that the hearing would be useful to resolution of any of his federal habeas claims. Ali failed to respond to the issue in his traverse.

AEDPA's section 2254(e)(2), governing evidentiary hearings, provides:

> If the applicant has failed to develop the factual basis of a claim in state court

> proceedings, the court shall not hold an evidentiary hearing unless the applicant shows that:
>
> (A) the claim relies on–
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The United States Supreme Court has interpreted the opening paragraph of the section to provide that where a petitioner has indeed exercised diligence to "develop the factual bases" of his claims in state court, the requirements of section 2254(e)(2)(A)& (B) do not apply to his request for an evidentiary hearing. Williams v. Taylor, 529 U.S. 420, 435 (2000); Holland v. Jackson, 542 U.S. 649, 652-53 (2004). In other words, a petitioner who has exercised such diligence will be taken out of the purview of section 2254(e)(2), or as the Ninth Circuit has sometimes termed it, subjected to the evidentiary standard in "pre-AEDPA" cases. Griffey v. Williams, 345 F.3d 1058 (9th Cir. 2003), vacated on other grounds as moot, 349 F.3d 1157 (9th Cir.2003) (petitioner died); Williams, 529 U.S. at 430 (showing under 2254(e)(2) "applies only to prisoners who have 'failed to develop the factual basis of a claim in state court proceedings'").

Accordingly, "[a] petitioner who avoids the reach of § 2254(e)(2) qualifies for an evidentiary hearing if the petitioner alleges facts, that if proven, would entitle him to relief and the state court trier of fact

has not, after a full and fair hearing, reliably found the relevant facts." Griffey, 345 F.3d at 1065 (citing Jones v. Wood, 114 F.3d 1002, 1010, 1013 (9th Cir. 1997)). "In other words, petitioner must allege a colorable constitutional claim." Turner v. Calderon, 281 F.3d 851, 890 (9th Cir. 2002). There is no "per se rule requiring an evidentiary hearing whenever a petitioner has made out a colorable claim, though." Id. "Rather, a petitioner must establish that his allegation. . ., if proven, would establish a constitutional deprivation." Id. "Entitlement to an evidentiary hearing based on alleged ineffective assistance, for example, requires a showing that if [petitioner's] allegations were proven at the evidentiary hearing, deficient performance and prejudice would be established." Id. Where a petitioner is unable to make the showing of diligence required, he will be subjected to the more stringent standards contained in section 2254(e)(2)(A) & (B). Williams, 529 U.S. at 435; Holland, 542 U.S. at 652.

The court has reviewed the record, and confirmed that Ali did not request an evidentiary hearing in either his appellate briefs on direct appeal or in his habeas petitions in the state appellate courts. Diligence "depends upon whether petitioner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005) (quoting Williams, 529 U.S. at 435). "Diligence requires in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." Williams, 529 U.S. at 435. The Ninth Circuit has held that where a petitioner brought his claims only on direct review before the state appellate court, failed to request an evidentiary hearing there, and failed to file a state habeas petition as to those claims, that he "failed to develop the factual basis of his claim in state court proceedings." Bragg v. Galaza, 242 F.3d 1082, 1090 (9th Cir. 2001). "[Petitioner's] inactions show[ed] insufficient diligence to satisfy the standard set forth in Williams." Id. Because Ali cannot be said

to have exercised diligence in developing the factual bases of these claims in state court, his request must be subjected to the more stringent standards of § 2254(e)(2).

Turning to that section, Ali has not even articulated, much less demonstrated, that "new" evidence exists that could not have been previously discovered or raised in the state court proceedings through the exercise of due diligence. See § 2254(e)(2)(A)(I). Permitting an evidentiary hearing on issues which could have been raised in the state court proceedings, but were not, would only serve to provide "an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." Williams, 529 U.S. at 437. Nor is there a new rule of constitutional law which is made retroactive on collateral review in this case. See § 2254(e)(2)(A)(ii).

Alternatively, even if Ali had requested an evidentiary hearing before the state courts, thus exercising diligence in fully developing his claims, it is not clear to the court "what more an evidentiary hearing might reveal of material import." See Gandarela v. Johnson, 286 F.3d 1080, 1087 (9th Cir. 2002) (denying petitioner's request for evidentiary hearing regarding his assertion of actual innocence). Because Ali's claims may be resolved by reference to the state court record and the documentary evidence he has submitted, the court denies his conditional request for an evidentiary hearing. See Griffey, 345 F.3d at 1067 (even where petitioner had shown diligence entitling him to evidentiary hearing, Ninth Circuit concluded that petitioner was not entitled to evidentiary hearing because his claims could be resolved by reference to the state court record and the documentary evidence he submitted); see also Campbell v. Wood, 18 F.3d 662, 679 (9th Cir. 1994).

CONCLUSION

For the reasons set forth above, Ali's petition for a writ of habeas corpus is DENIED.
The clerk shall close the file.

IT IS SO ORDERED.

Dated: August 24, 2007

/s/

PHYLLIS J. HAMILTON
United States District Judge

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,

v.

MOHAMMED HAROON ALI,
Defendant and Appellant.

A096034

(San Mateo County Superior Ct. No. SCO46199A)

Appellant Mohammed Haroon Ali killed his girlfriend by strangling her, first with his hands and then with a twisted T-shirt wrapped around her neck. Appellant's defense at trial was that he was guilty of no more than second degree murder or voluntary manslaughter because he killed without premeditation, and in a heat of passion upon the victim's provocation. The jury rejected the defense and convicted appellant of first degree murder. (Pen. Code, §§ 187. subd. (a), 189.) Appellant is serving a prison sentence of 25 years to life, doubled as a strike and then enhanced an additional 5 years due to a prior serious felony conviction. (Pen. Code, §§ 187, subd. (a), 189, 190, subd. (a), 667, subd. (a)(1), 1170.12, subd. (c)(1).)

Appellant claims on appeal that the jury was improperly instructed, that the prosecutor excluded

prospective jurors on the basis of race, and that evidence of appellant's violent crime against a former girlfriend was wrongly admitted.[1] We reject the claims and affirm the judgment.

FACTS

Appellant and Tracey Biletnikoff dated in late 1998 and early 1999. Appellant was 23 years old and had a history of drug abuse. Appellant had recently graduated from a rehabilitation program at Project 90, a San Mateo residential alcohol and drug recovery facility. Appellant started work as an adolescent counselor at Project 90 in January 1999, and shared an office at Project 90' s Friendship Hall, a facility for meetings and social events. Biletnikoff was 20 years old and also recovering from drug addiction.

Trial witnesses had different perspectives on the couple's relationship, but several testified that Biletnikoff was ambivalent about her relationship with appellant and intended to end it. About three weeks before she was killed, Biletnikoff told her stepmother that she was "tired of being the caregiver" and tired of appellant threatening to go back on drugs if Biletnikoff left him. On Monday, February 15, 1999, the day she was killed, Biletnikoff told her best friend that she was breaking up with appellant that day.

Meanwhile, appellant had relapsed over the weekend. On Saturday night and Sunday morning, February 13 and 14, appellant smoked crack cocaine and drank beer while "bar hopping" in San Francisco, then partying in a motel room with two friends from Project 90. Appellant also used heroin for the first time.

On Monday, February 15, appellant and Biletnikoff arrived at a Project 90 facility around 4:30 or 5:30 p.m., and appellant confessed to program

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[1] Appellant also petitions for a writ of habeas corpus. We deny that petition today by separate order.

managers that he had relapsed two days prior. Appellant was not under the influence of drugs or alcohol on Monday, but was upset about his relapse over the weekend because he would lose his job at Project 90 and would have to start over again in the rehabilitation program. Also, appellant was on probation and scheduled for a drug test the next day, February 16. Appellant worried that he would be found in violation of probation and sent to prison for a nine-year term. Appellant, an East Indian citizen of Fiji, was also facing deportation proceedings from his prior conviction. People at Project 90 consoled appellant and assured him that he could return to the program, and Biletnikoff was supportive of appellant and comforted him.

Biletnjkoff left to attend an afternoon recovery meeting, and a Project 90 manager agreed that he would look after appellant. Appellant was angry with Biletnikoff because she refused to let him use her car to go to San Francisco, where she believed he wanted to go to "get high." A Project 90 counselor found appellant at the bus stop and convinced him to attend a recovery meeting at Friendship Hall. Appellant attended the meeting from 5:00 to 6:00 p.m., but never made any promise to rejoin the rehabilitation program. An unwillingness to return to the program would create difficulties in his relationship with Biletnikoff, as Project 90 managers testified that a recovering substance abuser cannot stay in a relationship with someone who refuses treatment without jeopardizing her own recovery.

Appellant remained at Friendship Hall, and was in his office playing a computer card game about 7:45 p.m., when people started to gather at the building for an 8:00 p.m. meeting. Biletnikoff completed her afternoon meeting at the Women's Recovery Center and arrived at Friendship Hall for the 8:00 p.m. meeting. Biletnikoff continued to worry about appellant and his demands to use her car, and friends told Biletnikoff that she should not lend her car.

Appellant's program mentor arrived at Friendship Hall and spoke to Biletnikoff, who was

sad, and who angrily told him that appellant had relapsed and was "being an ass." Appellant's mentor spoke to appellant and told him he had to start over on his rehabilitation. The mentor also asked appellant, "[w]hy are you taking it out on Tracey [Biletnikoff]? Why are you being hard on her when you're the one that made the mistake?" Appellant cried and said he would like to talk to her. The mentor went to speak to Biletnikoff, and told her appellant was in the back office. Biletnikoff went to talk to appellant while others went to the meeting. Biletnikoff was seen in the early stage of her encounter with appellant, talking quietly to him from his office doorway.

Appellant killed Biletnikoff during this encounter by strangling her, first with his hands and then with a twisted T-shirt. A forensic pathologist testified that a person being strangled may lose consciousness in a few seconds, but that death by strangulation takes from three to five minutes. The pathologist discredited defense counsel's suggestion that Biletnikoff may have died in seconds from pressure upon her neck's carotid sinus.

Biletnikoff did not die quickly: her neck showed extensive bruising and internal bleeding from manual strangulation, and her face was suffused with blood from the force of the T-shirt tied tightly around her neck. Appellant strangled Biletnikoff with his hands for some period of time, rupturing blood vessels and causing hemorrhaging of her neck muscles and organs. He then went over to the desk in his office, took his T-shirt from the desk, stood over her prostrate body, twisted and tightly wrapped the T-shirt around her neck, and knotted it. Forensic evidence established that Biletnikoff was still alive when appellant strangled her with the T-shirt. Appellant never removed the T-shirt he used as a ligature. When the pathologist examined Biletnikoff's body two days after her death, the ligature around her neck was still so tight that the pathologist could not pass even the thin tip of tweezers between the ligature and the victim's neck. Biletnikoff's body showed other signs of violence. Her face was bruised

and scraped in multiple areas around her forehead, nose, and mouth from the application of blunt force.

After strangling Biletnikoff to death, appellant put Biletnikoff's body into a Project 90 van. Appellant drove home, arriving there around 9:00 p.m. Appellant was living with his sister and brother-in-law, Khuseed and Mohammed Khan, in San Mateo. Appellant's family saw no signs that appellant had been in a fight; his face showed no cuts, bruises, red marks, or any other kind of injury. Appellant changed his clothes and went to talk to his 18-year-old nephew, Mohammed Atish Atik Sharif. Appellant and Sharif went outside, and appellant said that there was an "accident" and Biletnikoff died when he unintentionally struck Biletnikoff's face with his hand or elbow. Sharif asked appellant where Biletnikofff was, and appellant said "right here" and pointed toward a parked van. Appellant told Sharif that he did not want to go back to jail, and asked Sharif for money. Appellant and Sharif arranged to meet around 11:00 p.m., and appellant left in the van.

Appellant dumped Biletnikoff's body down a hillside at Canada College. Appellant then met his nephew as planned, and Sharif followed in his car as appellant drove the van back to Project 90's Friendship Hall. Appellant did not have authority to drive the Project 90 van; Project 90 vans are restricted to program assignments and must be signed out. Appellant left the van and the two men drove in Sharif's car to a bank automated teller machine where Sharif withdrew money to give appellant. Sharif drove appellant back to Friendship Hall where appellant took Biletnikoff's car, entering the car with a key.

Sharif had convinced appellant to talk to his sisters, and appellant and Sharif drove separately to the sisters' San Leandro home, arriving around midnight. Appellant told his sisters and a brother-in-law that he had an "accident" with Biletnikoff, and hit her with his elbow while fighting with Biletnikoff to get a key from her. Appellant's sister telephoned the Khan residence and appellant told his brother-in-

law Mohammed Khan, that he accidentally hit Biletnikoff in the face with his elbow and that she was dead. Khan asked where the body was and appellant said he threw Biletnikoff over a cliff but did not know where. Khan told appellant to turn himself over to the police and to help them locate Biletnikoff, in the hope that she may still be alive. Appellant did not reply. The Khans asked one of the San Leandro sisters to bring appellant home, and Khan telephoned the police and reported the killing. Meanwhile, as the San Leandro household was preparing to take appellant home, appellant left.

Appellant fled to Mexico in Biletnikoff's car. Biletnikoff's body was discovered at Canada College the next morning, February 16, 1999. Appellant was apprehended shortly after 8:00 p.m. that night, crossing the border from Mexico back into California. Appellant told a customs inspector that he had visited Mexico to go "partying" with friends. When interrogated by San Mateo police officers, appellant initially denied killing Biletnikoff.

Appellant eventually confessed. Appellant said that he and Biletnikoff argued about his relapse. Biletnikoff wanted appellant to rejoin the rehabilitation program and he did not want to start over. Appellant asked Biletnikoff for a ride or the key to her car, and Biletnikoff refused, saying that she wanted appellant to stay and talk about reentering the program. Appellant grabbed the keys from Biletnikoff and, according to appellant, she hit him in the face and chest.[2] Appellant also told the police that Biletnikoff stood blocking the doorway, saying, "'I'm not gonna let you go, asshole . . ..,'" and comparing him to her ex-boyfriend who relapsed and never recovered. Appellant claimed Biletnikoff called him other names as they continued to argue. Appellant was angry and grabbed Biletnikoff's neck

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[2] Appellant gave inconsistent accounts of how he gained possession of Biletnikoff's car keys, as he also told the police that he searched Biletnikoff's clothes for the keys after she was dead.

with both hands. Appellant said that Biletnikoff hit him in the face as he continued choking her. Appellant released her and she fell to the ground as "white stuff" came from her mouth. Appellant went to his desk, took his T-shirt from the desk, and tied it tightly around her neck. Appellant told the police that he thought Biletnikoff was dead before he tied the T-shirt because of the "white stuff" from her mouth. When asked why he would tie the T-shirt if she was already dead, appellant said "I don't know" and then told the police "I was still mad at her." At trial, the pathologist testified that white froth is generated by people struggling to breathe, and that appellant's description of "white stuff" coming from Biletnikoff's mouth meant she was then still alive.

At trial, there was also evidence introduced of appellant's 1994 conviction for kidnapping his then girlfriend, Daisy Chandra. Chandra testified that appellant attacked and abducted her when she tried to end her relationship with him. In November 1994, appellant pulled Chandra from a friend's car, dragged her to his car, punched her repeatedly, threatened to kill her, and held her against her will for two nights. Appellant released her only after she said she would reconcile with him. As soon as she was released, she reported her abduction to the police. In December 1994, appellant broke into Chandra's home, accosted her with a knife, and forced her from the house and into his car. Appellant said he was going to kill her and drove to a secluded spot. Appellant punched Chandra and held her in the car until she again promised to reconcile with him. Appellant released Chandra, who reported her abduction to the police and testified against him in court. Appellant pled no contest to kidnapping and was placed on probation on a suspended nine-year prison sentence.

DISCUSSION

A. The jury was not misinstructed on voluntary manslaughter

Appellant's principal claim on appeal is that the jury was improperly instructed on voluntary manslaughter. The trial court gave several standard jury instructions, which appellant does not challenge, and also a special instruction that was proposed by the prosecutor and is the focus of appellant's objection on appeal. Under the standard jury instructions, the jury was advised that a killing is voluntary manslaughter, and not murder, when the killing occurs upon a sudden quarrel or heat of passion that amounts to adequate provocation. (CALJIC No. 8.50.)

The court continued with standard instructions in defining provocation: "What is meant by sudden quarrel or heat of passion [in] the area of provocation? To reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the [passion], and the assailant must act under the influence of that sudden quarrel or heat of passion. . . . [¶] The heat of passion that will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. [¶] A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which the defendant was placed and the facts and circumstances that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. [¶] Legally adequate provocation may occur in a short or over a considerable period of time. The question to be answered is whether or not at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection and from passion rather than from judgment. Notice it's an objective standard." (See CALJIC No. 8.42.)

The prosecutor also requested a special instruction emphasizing that provocation is judged objectively, and not upon personal characteristics of the defendant. Defense counsel objected that the jury should be permitted to consider appellant's personal characteristics, particularly his history of substance abuse and possible intoxication. The court overruled the objection and administered the special instruction, as follows: "The ordinarily reasonable person of average disposition is measured by an objective standard. Evidence of the defendant's personal characteristics is not relevant as to the determination of the conduct of an ordinarily reasonable person of average disposition."

Appellant does not renew his trial court objection to the special instruction, but presents a different challenge to it.[3] Appellant argues that the instruction erroneously "contains a crucial shift of focus" from whether the passion of the ordinarily reasonable person would have been aroused, to whether an ordinarily reasonable person would have engaged in the conduct at issue.

Appellant also maintains that the prosecutor further encouraged this mistaken shift of focus in his closing argument to the jury. The prosecutor told the jury, without defense objection: "There has to be a heat of passion at the time of the crime that would be aroused in the mind of the ordinarily reasonable person in the same circumstances. The facts of the case must be such that they would provoke the ordinarily reasonable person to attack the victim and inflict that fatal injury on the victim. That's what the average, ordinarily reasonable person would do. Not the defendant. [¶] He doesn't get to set up his own standard to excuse or justify the attack. To go down to this level of manslaughter would have to be that the average, ordinary, reasonable person would

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[3] The People argue that appellant cannot claim instructional error on grounds not presented below. We address the merits of the claim without resolving the waiver argument.

do that, would engage in this conduct when facing those circumstances."

No instructional error occurred so as to prejudice appellant's right to a fair trial. The special instruction states: "Evidence of the defendant's personal characteristics is not relevant as to the determination of the conduct of an ordinarily reasonable person of average disposition." It is undisputed that an objective, reasonable person standard applies in judging the adequacy of provocation, and that a defendant's personal characteristics, including intoxication, mental deficiencies, and psychological dysfunctions due to traumatic experiences, are irrelevant to that determination. (*People v. Steele* (2002) 27 Cal.4th 1230, 1253.)

There was no mistaken "shift of focus," in the use of the term "conduct." The special instruction's reference to an ordinarily reasonable person's "conduct" simply amplifies a principal of law stated in the standard jury instructions: "A defendant is not permitted to set up his own standard of conduct .... " (CALJIC No. 8.42.) Provocation must be sufficient to make an ordinarily reasonable person act rashly, not just sufficient to make defendant, with his personal characteristics of substance abuse, act rashly. There is no reasonable likelihood that the jury misunderstood the special instruction.

As for the prosecutor's argument to the jury, appellant failed to object at trial and thus waived any claims of prosecutorial misconduct on appeal. (*People v. Frye* (1998) 18 Cal.4th 894, 969-970.) Appellant acknowledges the waiver but maintains that the prosecutor's argument is relevant to assessing the likelihood of the jury misunderstanding the challenged instruction. However, the prosecutor's argument spent little time characterizing the law expressed in the special instruction, and was not erroneous in its characterization. The prosecutor properly stressed the objective standard applicable to the law of provocation: "There has to be a heat of passion at the time of the crime that would be aroused in the mind of the ordinarily reasonable

person in the same circumstances." The prosecutor also correctly stated that appellant "doesn't get to setup his own standard to excuse or justify the attack." Appellant's dispute with other elements of the prosecutor's argument are not focused upon the subject matter of the special instruction. The issue cognizable on appeal is appellant' s complaint about the special instruction, under which we may consider the prosecutor's jury summation relating to it. Not cognizable on appeal is a general attack on the prosecutor's summation unrelated to the special instruction. Those claims were waived by appellant's failure to object at trial.

B. The jury selection process was not marred by purposeful discrimination.

Appellant contends that the prosecutor excluded prospective jurors on the basis of race. Jury selection was conducted over a period of four days, and numerous peremptory challenges were exercised on both sides. The prosecutor exercised 15 peremptory challenges during jury selection, 2 against African-Americans. No African-Americans were on the jury as finally constituted.

Each party is entitled to peremptory challenges during jury selection but may not exercise those challenges on the basis of race. (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97 (*Batson*); *People v. Wheeler* (1978) 22 Ca1.3d 258, 276 (*Wheeler*); Code Civ. Proc., § 231.) Federal and California standards for evaluating the constitutionality of a prosecutor's use of peremptory challenges are similar. (*People v. Reynoso* (2003) 31 Cal.4th 903, 915.) A three-part process is used at trial for evaluating whether a prosecutor has wrongly excluded potential jurors on the basis of race. "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [Citation.] Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror .in question. [Citation.] Third, in light of the parties' submissions, the .trial court must determine whether the defendant has shown

purposeful discrimination." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 328-329, citing *Batson, supra*, 476 U.S. at pp. 96-98.) "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.)

The African-American prospective jurors challenged by the prosecutor were M.C., a female public school employee, and D. J., a male software designer.[4] The trial court initially found no prima facie showing of group bias upon the prosecutor's peremptory challenge to M.C. However, when D. J. was challenged late in the jury selection process, the court found a prima facie showing of group bias and asked the prosecutor to explain his decision to remove both M.C. and D. J.

The prosecutor provided three reasons for excluding M.C. from the jury. First, M.C.'s stepson was prosecuted for molesting her daughter and, when first questioned whether the incident might influence her as a juror, M.C. said "I really don't think—I don't think it would have any bearing. I don't know. I don't think it would." The prosecutor said that M.C.'s initial uncertainty in answering the question and her contact with the criminal justice system concerned him. Second, in the course of questions about her opinions of attorneys, M.C. mentioned that she hoped that the attorneys would operate in a "decent and respectable manner." When asked how she would feel about the attorneys aggressively cross-examining witnesses, M;C. said she would not penalize the attorneys provided the cross-examination was done in a respectful and professional manner. M.C. told the prosecutor that the respectful conduct of the attorneys was "an important point" for her. In explaining why he excused M.C. from the jury, the prosecutor said he felt it unreasonable for the conduct of the attorneys to influence a juror's judgment of the case and he was concerned that M.C.

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[4] The full names of the prospective jurors are not used to protect their privacy.

would resent an aggressive approach in advocacy. Third, M.C. described herself as a regular member of a church and, when asked if her spiritual practice would prevent her from judging other people, she hesitated. M.C. then explained that she could make a decision based on the evidence, which she contrasted with how she had understood the word "judging" under her Christian faith. The prosecutor cited M.C.'s possible reluctance to sit in judgment of others as grounds for excluding her.

The prosecutor detailed a combination of four reasons for excluding D.J. from the jury. First, the prosecutor said he felt D.J. would "over-intellectualiz[e]" the case and not wait until deliberations to reach a decision, given his statements on voir dire. When D.J. was questioned whether he could keep an open mind and not make a decision until deliberating with his fellow jurors, D.J, said he would "continuously evaluate" the evidence, but that people make decisions and then change them as new information is received. Defense counsel explained to D.J. that "ideally you wouldn't make any decisions at all until you have a chance to discuss the evidence and the testimony with your fellow jurors[.]" D.J. replied: "I really don't think people work that way." In explaining why he exercised a peremptory challenge against D.J., the prosecutor said he thought that D.J.'s "constant decision changing" meant that the prospective juror would "have difficulty arriving at a conclusion here."

The second reason provided by the prosecutor for excluding D.J. from the jury was that D.J. gave a "flip answer." The prosecutor had questioned D.J. about a number of issues, and concluded by asking, "[a]ny other reason you couldn't be fair and impartial to both sides that you can think of?" D.J. replied: "I don't think there was a reason just now. No. There's not a reason right now." The answer apparently evoked laughter in the courtroom. The prosecutor said he was concerned that D.J. had chosen to interpret his question's reference to "any other reason" as an implication that D.J. had already displayed partiality to one side, and sarcastically

replied that "I don't think there was a reason just now."

The third stated ground for excusing D.J. from the jury was D.J.'s general "casualness," evidenced by his "lighthearted banter" with the trial judge. The fourth, and final factor, which the prosecutor said he relied upon was D.J.'s past experience with the adjudication of criminal cases. D.J.'s two brothers and father-in-law are attorneys. One brother is an appellate attorney recently appointed to the Texas Supreme Court. D.J. said he assisted his brother in preparing for argument before the United States Supreme Court in two criminal cases, in which the brother represented defendants. D.J. said that he had "a lot of discussion" with his brother about the criminal cases. The prosecutor was concerned that a juror previously involved on the side of an appellate defender in criminal cases would favor the defense.[5]

The trial court considered defense counsel's *Wheeler/Batson* motion in light of the prosecutor's stated reasons for excluding prospective jurors M.C. and D.J., and denied the motion. We shall assume that the trial court properly found that appellant made a prima facie showing of the presence of purposeful discrimination (step one), and appellant does not dispute that the prosecutor provided facially race-neutral justifications for his peremptory challenges to African-American prospective jurors (step two). (*Purkett v. Elem, supra*, 514 U.S. at pp. 767-768.) The issue on appeal is whether appellant has proved purposeful discrimination, which requires an examination of the persuasiveness of the prosecutor's justifications (step three). (*Miller-El v. Cockrell, supra*, 537 U.S. at pp. 338-339.)

In the trial court, the examination of the persuasiveness of the prosecutor's justifications

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[5] On appeal, appellant asserts that recent research has revealed that the cases advocated by D.J.'s brother were actually civil rights cases, not criminal cases. But information about the cases during voir dire came from D.J., who indisputably said he assisted his brother in "criminal cases."

largely turns on an evaluation of whether the prosecutor's facially race-neutral justifications are credible. (*Miller-El v. Cockrell, supra*, 537 U.S. at p. 339.) "Credibility can be measured by, among other factors, the prosecutor's demeanor, by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Ibid.*)

In the appellate courts, a trial court's factual determination' of the absence of discriminatory intent entitled to great deference. (*Miller-El v. Cockrell, supra*, 537 U.S. at pp. 339-340; *Batson, supra*, 476 U.S. at p. 98, fn. 21.) On direct review of a state court judgment, the United States Supreme Court will not overturn a state trial court's finding on the issue of discriminatory intent on a *Batson* motion unless the determination was "clearly erroneous." (*Hernandez v. New York* (1991) 500 U.S. 352, 369 (plur. opn. of Kennedy, J.); *id.* at p. 372 (conc. opn. of O'Connor, J.).) The California appellate courts apply a similar standard of review under *Wheeler*, and defer to the trial court's finding of lack of purposeful discrimination if supported by substantial evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 196-197.)

We find no error in the trial court's determination here that appellant failed to carry his burden of proving purposeful discrimination. The trial court closely questioned the prosecutor and weighed the proffered explanations under correct standards, contrary to appellant's claims on appeal. Appellant complains that the trial court misapplied the law because, in ruling on the motion, the court once framed the issue as whether the prosecution's justification for the peremptory challenges was "reasonable." Appellant notes that the proper focus is upon the genuineness of the asserted nonracial motive, not the objective reasonableness of the motive. (*Purkett v. Elem, supra*, 514 U.S. at p. 769.) However, the genuineness of the prosecutor's justification requires an evaluation of credibility, and a factor in judging credibility is "how reasonable, or how improbable, the explanations are." (*Miller-El v. Cockrell, supra*, 537 U.S. at p. 339.) The trial court

properly considered the reasonableness of the prosecutor's explanations in assessing credibility, and the court's use of the word "reasonable" in rendering its ruling does not demonstrate a misapprehension of the proper legal standards.

Appellant also complains that the trial court failed to make detailed findings in denying the motion. Appellant relies on *People v. Silva* (2001) 25 Cal.4th 345, 386, which held that the trial court's obligation to make a "sincere and reasoned attempt to evaluate each stated reason [by the prosecutor] as applied to each challenged juror" is not discharged by a "global finding" that the reasons appear sufficient when "the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both." However, our high court has since clarified that *Silva* does not require a trial court to make explicit and detailed findings for the record every time a *Batson/Wheeler* motion is denied. (*People v. Reynoso, supra*, 31 Cal.4th at p. 929.) "Where, as here, the trial court is fully apprised of the nature of the defense challenge to the prosecutor's exercise of a particular peremptory challenge, where the prosecutor's reasons for excusing the juror are neither contradicted by the record nor inherently implausible [citation], and where nothing in the record is in conflict with the usual presumptions to be drawn, i.e., that all peremptory challenges have been exercised in a constitutional manner, and that the trial court has properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges, then those presumptions may be relied upon, and a *Batson/Wheeler* motion denied, notwithstanding that the record does not contain detailed findings regarding the reasons for the exercise of each such peremptory challenge." (*Ibid.*)

Appellant assails the prosecutor's justification for excusing M.C. and D. J. from the jury, but we find substantial evidence supporting the trial court's finding that the peremptory challenges were exercised without a discriminatory purpose. Appellant argues, as to the exclusion of M.C., that

her initial hesitancy in saying whether, her spiritual beliefs or prior contact with, the criminal justice system in a molestation case would influence her as a juror was overborne by her later, less equivocal statements. But attorneys are entitled to exercise peremptory challenges based upon a prospective juror's first, unguarded responses to questioning, and discriminatory intent cannot be inferred from an attorney's reluctance to credit later responses.

Nor has appellant shown purposeful discrimination in the peremptory challenge of D.J., who the prosecutor said would "over-intellectualiz[e]" the case; evinced a flip and casual attitude; and was a collaborator in a brother's representation of criminal defendants. An attorney may fairly consider a prospective juror's attitude and intellectual proclivities in exercising peremptory challenges without giving rise to an inference of discriminatory intent. (*People v. Reynoso, supra*, 31 Ca1.4th at pp. 924-925 & fn. 6.) Appellant denigrates the prosecutor's use of a peremptory challenge against D.J. as one motivated by a racist distrust of intellectual African-Americans, but the claim is pure invention devoid of record support. Nothing in the record reveals any racist attitude or comments by the prosecutor, nor did appellant make any showing in the trial court that the prosecutor's concern about jurors "over intellectualizing" the case was limited to African-Americans.[6] Substantial evidence supports the trial court's determination that appellant failed

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[6] In fact, the trial court noted that the prosecutor had used a peremptory challenge against a Caucasian prospective juror who, like D. J., appeared well qualified to the court but was also "independent minded." Appellant asks us to engage in additional comparative analyses of the prospective and seated jurors but the trial court made this single comparison, and appellant never presented any such analysis in the trial court. Where, as here, "such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal. . . ." (*People v. Johnson* (2003) 30 Ca1.4th 1302, 1325, cert. granted in part sub nom.

(continued...)

to prove purposeful discrimination in the prosecutor's exclusion of two African-Americans from the jury.

C. Evidence of appellant's prior domestic violence was properly admitted.

Appellant's final claim on appeal is that evidence of his violent crime against his former girlfriend, Daisy Chandra, was wrongly admitted. The evidence was admitted, over objection, under Evidence Code sections 1101 and 1109. Evidence of a defendant's prior misconduct is generally inadmissible, but may be admitted when relevant to prove some fact other than his disposition to commit the charged crime, such as intent. (Evid. Code, § 1101.) Also, if the prior misconduct was the recent commission of domestic violence, that evidence may be admitted where additional acts of domestic violence are charged. (Evid. Code, § 1109, subd. (a)(1). However, the admission of evidence is subject to the protections of Evidence Code section 352, which vests the trial court with discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The trial court admitted the Chandra evidence upon finding it relevant to the prosecution's theory

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(...continued)

Dec. 1, 2003, *Johnson v. California* (2003) _ U.S. _ [2003 WL 22232061].) Defense counsel did argue to the trial court that D.J. was "not the first juror to sort of make a light-hearted remark," that M.C. "gave a similar answer to everybody else" when questioned about her religious beliefs, and that "another juror" shared M.C.'s view that attorneys should behave professionally. These general references do not constitute a meaningful showing sufficient for the trial court, much less for this court, to make a comparative juror analysis. Moreover, the juror comparisons urged on appeal are unrelated to trial counsel's references to these alleged similarities between the responses of seated jurors and challenged jurors.

that appellant killed Biletnikoff because she wanted to end the relationship, and likely told him so when he relapsed and refused to renew his rehabilitation efforts. Appellant's threats to kill Chandra, and violent acts against her, when she ended her relationship with him were thus relevant to proving that appellant murdered Biletnikoff when she likewise indicated an intention to leave him.

Appellant argues that the Chandra evidence was wrongly admitted on several grounds. First, appellant contends that Evidence Code section 1109 violates due process in allowing the admission of prior misconduct to show a propensity to commit a presently charged offense. This court has previously considered, and rejected, this same argument. (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096.) Appellant has not established any reason to reconsider our position.

Second, appellant maintains that the trial court abused its discretion under Evidence Code section 352 in admitting the Chandra evidence. The trial court's ruling on the issue reflects a careful, and sound, balancing of the probative value of the evidence against its potential for undue prejudice. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) Appellant argues that the Chandra evidence was not probative of intent because he offered to stipulate at trial that he intended to kill Biletnikoff, and thus evidence relating to his intent became irrelevant. In fact, defense counsel never agreed to any such stipulation, and only indicated a noncommittal willingness to consider a stipulation when suggested by the trial court. Even if appellant conceded his intent to kill, "the prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent." (*People v. Steele, supra*, 27 Cal.4th at p. 1243.) Moreover, the Chandra evidence was relevant to premeditation and deliberation, in addition to intent.

The Chandra evidence was offered to show that appellant responds violently to a woman's rejection, and that his violent response is deliberate and not spontaneous. With Chandra, appellant physically

attacked her, threatened to kill her, and abated his violence only after she agreed to reconcile with him. The prosecutor's theory at trial was that appellant acted similarly with Biletnikoff, with the tragic exception that appellant did not stop at threats. While appellant's attacks upon Chandra showed more planning than did his attack upon Biletnikoff, the crimes were not so dissimilar as to make the Chandra evidence irrelevant. Appellant capitalizes on the fact that he is the sole survivor of his Friendship Hall encounter with Biletnikoff to argue that there is no "direct" evidence that Biletnikoff did reject him, as Chandra had done. However, there was substantial evidence that Biletnikoff intended to end her relationship with appellant, and that his relapse and refusal to receive treatment made the breakup necessary to her own recovery. The evidence supported an inference that she expressed her intention to end the relationship during her encounter with appellant, thus making the Chandra evidence highly probative.

Appellant's third, and final, challenge relating to the Chandra evidence is his claim that the standard jury instruction guiding the consideration of evidence of prior domestic violence violates due process in lessening the prosecution's burden of proof. (CALJIC No. 2.50.01.) The California Supreme Court has recently rejected that assertion and found the disputed instruction constitutional. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016.) As appellant acknowledges, the high court's decision forecloses his claim in this court.

DISPOSITION

The judgment is affirmed.

Sepulveda, J.

We concur:

Reardon, Acting P.J.

Rivera, J.

Filed May 12, 2004
Supreme Court
Frederick K. Ohlrich, Clerk
Deputy

Court of Appeal, First Appellate District, Division Four – Nos. A096034/A103966

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MOHAMMED HAROON ALI, Defendant and Appellant.

Petition for review DENIED.

/s/

_____

Chief Justice

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No. 09-894

–ooOoo–

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

–ooOoo–

MATTHEW CATE, Director of California Department of Corrections and Rehabilitation, *Petitioner*

vs.

MOHAMMED HAROON ALI, *Respondent*

–ooOoo–

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

–ooOoo–

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

–ooOoo–

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Parties to the Proceeding

Petitioner Matthew Cate is named herein in his official capacity, as the chief administrator of the California state prison system, the real party in interest is the State of California Petitioner will accordingly be referred to as "the State" throughout this brief

Respondent is not aware of any other potential parties to this proceeding

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

– ooOoo –

MATTHEW CATE, Director of California Department of Corrections and Rehabilitation, *Petitioner*

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– ooOoo –

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE [1]

A. Jury Selection

On November 8, 1999, the State of California charged Mohammed Ali with the first-degree murder of his girlfriend, Tracey Biletnikoff. Ali entered a plea of not guilty, and stood trial.

During the jury selection process, the state prosecutor used two of his peremptory challenges to strike the only African-Americans in the jury pool, first striking M.C.[2] and

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[1] Parts "A" and "B" of the following procedural history (including the footnotes) are taken *verbatim* from the Ninth Circuit's amended opinion in *Ali v. Hickman*, 584 F.3d 1174, 1177-79 (9th Cir. 2009). Although the State sets out that opinion in its Appendix ("App." at 1-43), in the State's version the amendments – which are significant – are not incorporated into the body of the opinion. Respondent thus sets out the pertinent portion of the opinion below in its final version, for the Court's convenience.

[2] We refer to this juror by her initials in order to protect her privacy.

then Darrell Jefferson Ali's trial counsel challenged both these strikes in turn under *People v Wheeler*, 22 Cal 3d 258, 583 P 2d 748 (1978) (California's equivalent of *Batson* [*v Kentucky*, 476 U S 79 (1986)]), requesting an evidentiary hearing on the issue of the prosecutor's motive After the prosecutor struck Jefferson, the trial judge granted the request

At the ensuing hearing the prosecutor provided the following explanation for his strike of MC

> M C – yesterday, I exercised my challenge there for the following reasons We had an out-of-the-presence-of-the-jurors discussion with her about private matters wherein she talked about family members and the discussion with those involving the molestation of one child by another child, the involvement in the system The way she described that, she ultimately told the Court she thought that that would not play a role, would not affect her judgment Her words were that she doesn't think it will affect her judgment in this case She did not say it won't She said she doesn't think on that It did involve family members within the system That was, level one, a concern that I had I have exercised challenges to other jurors for that same reason
>
> No 2, she was very emphatic that – about – to Mr Morales, and then to me later, about her concerns about attorneys and the way they conducted themselves in the courtroom, that if it was anything less than professional and respectfully done that that would affect her
>
> THE COURT Would that be an unreasonable expectation?
>
> PROSECUTOR It would not be an unreasonable expectation to say, that it would occur to say it would affect her judgment was unreasonable That's why Mr Morales initially dealing on this issue followed up with that with her to say there were times he might cross-examine witnesses in an aggressive fashion and do that, to find out whether that would affect her judgment of him on that I then followed up with her in my questioning to inquire about the same things I thought we would act respectfully, but did she think it would affect her Her demeanor, and the way she responded to that made it very clear to me that something she would – I think all of us would like to have occur, I expect it will occur, but as Mr Morales has properly pointed out to

several jurors, at times there could be an aggressive approach to the case, that sometimes there may not That gave me cause for concern, more so, of course, is the prior involvement in the prior offense

No 3, Your Honor, the question was posed to her and it was posed by the defense about what she felt in terms of sitting in judgment of others Her response to that was a pause, reflection, and then she said, yes, that could be a problem for her, sitting in judgment of others, because she was thinking of her Christian faith Mr Morales then explored that with her and went further into, Well, what we would be talking about here is judging facts and that type of a matter She thought about it and said, Well, taking that into consideration, I believe that is something I could do without crossing my religious tenets I thought there was hesitancy in what she said

Obviously, it is my burden to get twelve jurors who could judge the case I thought a combination of these factors gave me good reason to be concerned about her ability to fairly and impartially do it, and I exercised a peremptory challenge for that reason and for that reason alone

The trial court then asked the prosecutor to provide his reasons for striking Darrell Jefferson, to which he responded

I thought Mr Jefferson was an excellent juror up until the questioning here, based on what he did – you recall he came in and engaged in some banter with the Court when he was talking about his hardship request, that he – I believe it was a hardship, not publicity, inquiry that was done in chambers As the Court stated a few minutes ago, when you expressed it, there were two things that caused me to change my mind One of them was in response to Mr Morales' question That question had to do with there was something – where he talked about, we make decisions as we go along It gave Mr Morales some concern It gave me some concern

Mr Morales explored it a bit further with him Well, wait You can't make the decision He said, Well, we do it That's how life works I know – and he said, We may change them as we go along but we make decisions I have a phenomenally great concern about the intellectualizing I thought that would do – it would be an over-intellectualizing of the case

I want jurors, what I think Mr Morales was striving for with him, about keeping an open mind until the end and not making decisions The Court arrived at a conclusion there that that may be a semantical difference or

something else, and I respect that conclusion, when you told Mr Morales [during Jefferson's voir dire] to move on, but it gave me cause for concern there

But at that point I was still considering the peremptory challenge, became evident to me when in response to a question from me he gave what – and it's personal to me I respect it may be I thought he gave me, and I respectfully use these words, a smart-ass answer

THE COURT Which [response]?

PROSECUTOR The one when I commented to him, Is there anything else that you could think of that would cause you not to be fair and impartial, a question I have asked probably of over 50 jurors, 40 jurors in this case and never received other than no or maybe some answer His was, I haven't done anything yet, immediately provoking a barrel of laughter throughout the courtroom I was offended by that comment

By those two things, combined with the fact that he had had some contact, although he said he could lay it aside, and I respect that possibility, with dealing with a public defender and hearing about those cases

That combination of things caused me to change my mind Race had nothing to do with either of these things

Those are my reasons, Your Honor

THE COURT What was the reason again about the hardship that you assert, Mr [prosecutor?]

PROSECUTOR My comment was, when [Jefferson] came in and spoke with you in the hardship – I am relaying to the Court my thought process – and the banter he engaged in I thought it was light-hearted It was not the hardship itself that concerned me I thought it was a lighthearted banter, but I thought it reflected – the word I'm looking for is not disrespectful, but I thought it reflected a casualness that was not typical of jurors

Again, this is a very subjective item and in and of itself would never give cause, but what I noted was the banter he engaged in was very much at

ease, and that is not what I'm looking for in a juror, however, again, I would never exercise a challenge on that alone That is merely factors that go into it I've given you four factors I believe that went into that decision

THE COURT With all due respect, I thought I heard two, one having to do with his banter and, slash, casualness during the hardship discussion, and, two, the response to the question you had asked that elicited laughter in the courtroom and then the – make that three – the judgment back and forth and mindchanging

What was the fourth one?

PROSECUTOR Yes, I understand The fourth one was the contact that he had had with cases where he had been – briefed may be too strong a word, but he had had a rundown from his brother, who was an appellate defender, on some case before the Supreme Court Hearing about that, that gave me cause for concern

After providing Ali with an opportunity to respond to these explanations, the trial court denied Ali's *Wheeler* motion The court concluded that the prosecutor's proffered justifications were "reasonable" In reaching this conclusion, the trial court did not consider comparative evidence regarding the responses of M C and Darrell Jefferson and the responses of non-African American members of the jury pool during the jury selection process

Following the denial of Ali's *Wheeler* motion, the case proceeded to trial After three days of deliberations, the jury found Ali guilty of first-degree murder He was sentenced to 55 years to life in state prison

B. California Appellate Proceedings

The California Court of Appeal affirmed Ali's conviction on direct appeal in an

unpublished opinion With respect to Ali's *Wheeler/Batson* claim, the appeals court concluded that "[t]he jury selection process was not marred by purposeful discrimination," holding that "substantial evidence support[ed] the trial court's finding that the peremptory challenges were exercised without a discriminatory purpose " Like the trial court, however, the California Court of Appeal did not engage in comparative juror analysis At the time, California law did not permit a court to conduct comparative analysis for the first time on appeal *See People v Johnson*, 30 Cal 4th 1302 1325, 71 P 3d 270 (2003), *rev'd sub nom Johnson v California*, 545 U S 162 (2005) [3]

In a separate order, the California Court of Appeal denied Ali's state habeas corpus petition without further analysis The California Supreme Court denied Ali's petition for review and, later, rejected his state habeas petition in a one-line disposition

C. Federal Habeas Proceedings

1 Ali filed a federal habeas petition The district court, unlike the California courts, performed a comparative juror analysis during its evaluation of Ali's *Batson* claim In doing so, the district court found that such an analysis "called into question" two of the prosecutor's reasons for striking M C , but concluded that, "based on the totality of relevant facts, Ali has not shown purposeful discrimination " (App 66, 71)

2 The Ninth Circuit reversed and directed the district court to issue a conditional writ of habeas corpus (App 41) After examining the state court record in its totality, the Ninth

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[3]California courts are now required to conduct a comparative juror analysis even if such an analysis was not performed by the trial court *See People v Lenix*, 44 Cal 4th 602, 187 P 3d 946 (2008)

Circuit held "that, in light of the overwhelming evidence indicating that the prosecutor in Ali's case acted with discriminatory intent when he struck M C , the California appellate court's finding to the contrary was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings [within the meaning of] 28 U S C §2254(d)(2)"[4] (*Ibid*.)[5]

In reaching this conclusion, the court examined each of the justifications offered by the prosecutor for striking the (only) two African American venire members It began with the prosecutor s principal reason for striking M C – his asserted concern that her "judgment and objectivity as a juror might be adversely affected by the fact that her daughter had been the victim of an attempted molestation by the daughter's half-brother"[6] (App 13) The Ninth Circuit rejected this justification primarily because it was disingenuous on its face Like M C 's daughter, the victim in this case was a young woman, and the prosecution also

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[4]Further statutory references also will be to Title 28 of the United States Code, and in particular to the portions of that Title enacted or amended by the Antiterrorism and Effective Death Penalty Act of 1996, or "AEDPA "

[5]The Ninth Circuit grounded its decision squarely on the "unreasonable determination of the facts" provision of §2254(d)(2) – although the court noted that, in the alternative, the state court's determination would also fail to pass muster under §2254(e)(1) (App 11 & n 4) Thus – despite what the State argues – the court below did not even purport to decide whether a rule requiring that state courts employ "comparative juror analysis for the first time on appeal," was "clearly established federal law" within the meaning of §2254(d)(1), and its decision in no way depended on the answer to that question

[6]Throughout its petition, the State refers to the molester as M C 's "stepson" – but, as the Ninth Circuit observed, "tellingly, M C never refers to the perpetrator as either her son or her stepson " (App 20) The record demonstrates that M C had very little connection with the young man prior to the molestation attempt, and even less afterwards, and there was no evidence that she harbored any sympathy for him Rather, she "expressed clearly and repeatedly her ongoing concern for her daughter and her daughter alone " (*Id* at 20-21)

intended to (and ultimately did) introduce a great deal of evidence regarding Ali's kidnaping and assaultive behavior toward young woman, some years earlier [7] (App 84-85) Thus, "to the extent that the attempted molestation of her daughter might affect M C 's impartiality, any bias on M C 's part logically would favor the prosecution, not the defense " (App 19)

The court next observed that "a comparative juror analysis reveals, as one might expect, that the prosecutor *favored* jurors who had been the victims of domestic abuse even if the juror indicated that his or her experiences might affect his or her objectivity " (App 21 [emphasis in original]) The prosecutor had even accepted "Juror 6" whose husband had physically abused her and their son, but who – unlike M C – seemed to find such abusive behavior excusable (App 22) Addressing the argument that M C 's responses in this regard had been equivocal, the court observed that several of the seated jurors had given identical (or in some cases, more ambiguous) answers (App 26-27)

Similarly, in addressing the prosecutor's second justification – that M C , when asked directly about it, said she expected the lawyers to conduct themselves in a professional and respectful manner – the Ninth Circuit began by noting that the purported justification made little or no sense on its own terms The trial judge and even the prosecutor himself expressed the view that such expectations were reasonable Moreover, one of the seated jurors ("Juror No 1") had said virtually the same thing (App 30-31)

The third justification given by the prosecutor was that M C (again, when asked

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[7]That earlier victim had been Ali's fiancee, he had kidnaped and struck her after he found her in bed with his best friend – offenses for which he was on probation at the time of the crime in this case (See App 45)

directly about this) had said that her religious beliefs made it difficult for her to "judge" others – although she had immediately and spontaneously clarified that being on the jury,

> "would mean something totally different than I would apply as far as my Christian faith would be interpreted More or less this is to make a decision based on information I've gained 'Judging' to me means I've made a decision based on no information, just from what I see and not knowing the person or just arbitrarily To me, that's a difference "

(App 32-33)

The Ninth Circuit observed that the prosecutor's first two reasons had been pretextual, which "raises an inference that this final rationale is also a make-weight " (App 33, citing, *Snyder v Louisiana*, 552 U S 472, 485 (2008)) The court next noted that, in asserting his justification, the prosecutor had misstated what M C said on the topic ("'she said, yes, that it could be a problem for her, sitting in judgment of others, because of her Christian faith '"), which also strongly indicated pretext – as did the prosecutor s failure even to question her on the subject [8] (App 34, discussing, *Miller-El v Dretke*, 545 U S 231, 244 (2005)

Finally, as a third basis for probing the sincerity of the prosecutor's justification, the Ninth Circuit compared it with the prosecutor's responses to two other venire members who had also been questioned about the potential effects of their respective religious beliefs on their ability to function as jurors One of them, a practicing Buddhist who was also struck, had said that her faith would be an obstacle in a capital case, and the prosecutor had questioned her thoroughly on the subject – unlike M C , to whom he had not addressed a

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[8]Defense counsel asked the only questions regarding M C 's religious faith (App 34)

single question (App 35, citing *Miller-El v Dretke*, *supra*) The other was a Jehovah's Witness, who was permitted to serve on the jury after saying telling defense counsel he did not "believe" that his faith would interfere Again, the prosecutor did not ask that juror even one question on the subject, even though his response was "arguably more equivocal than M C 's unqualified statement that she would be able to engage in the type of judging required of a juror " (App 35-36)

Following this Court's approach in *Snyder v Louisiana*, the Ninth Circuit concluded that the discriminatory elimination of M C itself made out a constitutional violation, and made it unnecessary to evaluate the validity of the prosecutor's challenge of the only other African American on the venire, Darrell Jefferson (App 36, citing *Snyder*, 552 U S at 477-78) As this Court did in *Snyder*, the Court of Appeal briefly examined the justifications given for that other strike, to see what light they might shed on the prosecutor's intent It concluded that at least two of the four reasons given for striking Mr Jefferson were apparently pretextual as well, which further supported the "conclusion that M C 's strike was racially motivated " (App 37, see, *id* at 38-41)

3 The State filed a timely "Petition for Rehearing with Suggestion for Rehearing *En Banc* " The request for *en banc* hearing was denied, without a single Ninth Circuit Judge voting in favor of granting it (App 2) The court also denied the request for rehearing by the panel, but took the opportunity to amend its opinion in two places (*Ibid*) Both amendments concerned the procedural history of the case, they made clear that the state trial judge had *not* decided whether the prosecutor's asserted justifications were sincere but rather

had only held that the justifications were "reasonable," and that only the state appellate court had opined on the genuineness of those justifications (*Ibid*)

WHY THE PETITION FOR WRIT OF *CERTIORARI* SHOULD BE DENIED

The State's petition takes aim at what it sees as defects in "the Ninth Circuit's approach to *Batson* claims" as a whole (Pet 9-12) The State has chosen an exceptionally poor vehicle for mounting such an assault, however, for what actually happened in this specific case – both in the state courts and in the Ninth Circuit – bears little or no relationship to the assertions on which the State has predicated its petition

The crux of the State's argument is that the Ninth Circuit "violated *Batson* and AEDPA by substituting its own inferences drawn from 'comparative juror analysis' for the trial judge's credibility finding " (Pet 12, see also, *e g* , *id* at 1 ["Question Presented"]) According to the State, the underlying jurisprudential error was in the Ninth Circuit's (supposed) assumption that it was entitled to disregard the trial court's "credibility findings" because the state courts' failure to employ comparative juror analysis was "contrary to, or involved an unreasonable application of, clearly established federal law" within the meaning of 28 U S C §2254(d)(1) (Pet 20-22) The State argues that, when the instant case was in the California courts, those courts had a rule that comparative analysis could not be employed in *Batson* cases "for the first time on appeal,' and there was no clearly established federal law to the contrary (Pet 22-23) The State urges the Court to grant *certiorari* to prevent the Ninth Circuit from committing the same errors in "many more" cases like this one (Pet 29, see also, *id at* 25, n 7)

Each component of the State's argument proceeds from at least one false premise

First, the trial judge never made any "credibility findings" regarding the genuineness of the prosecutor's justifications – he found only that they were objectively "reasonable," which (as this Court has repeatedly explained) is not the issue tendered by the *Batson* inquiry

Second, the Ninth Circuit's opinion was not based entirely, or even primarily, on "inferences drawn from 'comparative juror analysis'" Rather, the Ninth Circuit began by taking each of the prosecutor's justifications on its own terms, and, evaluating its credibility using the (other) uncontroversial tools set out in this Court's *Batson* jurisprudence, found it lacking The Court of Appeals only used comparative analysis to confirm conclusions that were already apparent

Third, the Ninth Circuit never even purported to address whether "comparative juror analysis" was "clearly established Federal law' under §2254(d)(1) – nor did it need to do so The Ninth Circuit determined only that the state courts' decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings," pursuant to §2254(d)(2), a separate provision that does not turn on the "clearly established Federal law" test

Fourth, even if the Ninth Circuit had adopted the approach ascribed to it by the State, and held the state fact-findings to be unworthy of deference because the state courts refused to consider all the pertinent evidence in making those findings, it would only have been doing what was mandated by this Court's precedent The failure – or in California's case,

the outright refusal – to employ comparative analysis in *Batson* cases was indeed an "unreasonable application" of Federal law as announced in *Batson* itself

Fifth, the State's contention that this case involves a procedural bar on "comparative juror analysis for the first time on appeal" is baseless, for several reasons Such a procedural bar was *not* the rule in California at the time of Ali's trial, and in this case, trial counsel actually *did* invoke comparative analysis Moreover, the State itself contends, in its petition, that the trial court did compare the treatment of African American and non-African American jurors (Pet 12)

Finally, even if the State's various assertions about the decision below were true, this still would not be an appropriate case for the Court to review As the State reluctantly concedes, the California Supreme Court has finally recognized that "comparative juror analysis' should be a part of *Batson* review at every level *People v Lenix*, 44 Cal 4th 602, 621 (2008), see Pet 26, n 8 The state courts' belated acceptance of the constitutionally-mandated process will necessarily alter the nature and scope of federal review of California *Batson* decisions and obviate the complaint at the core of the State's petition

It is also important to note a contention that is missing from the State's petition there is no suggestion that the Court must intervene to resolve a split among the federal appellate circuits That is because the Ninth Circuit's *Batson* jurisprudence – particularly in this case – is entirely congruent with the decisions of the other federal courts *See, e g , McGahee v Alabama Dept of Corrections*, 560 F 3d 1252 (11th Cir 2009), *Reed v Quarterman*, 555 F 3d 364 (5th Cir 2009)

The State is at its most candid when it complains, in its final argumentative heading, that "the Ninth Circuit's factual conclusions were wrong" (Pet 26) While Respondent emphatically disagrees, the more significant point is that this Court does not accept cases for "simple error correction" See, *e g*, *Kyles v Whitley*, 514 U S 419, 422, n 1 (1995) And that is really all the State's petition presents a request for error correction dressed up in someone else's clothes

1 The entire thrust of the State's petition is that the Ninth Circuit erred by failing to accord proper deference to the state trial court's "credibility findings" on the issue of whether the prosecutor's justifications were genuine expressions of his true motives for eliminating prospective juror M C The fundamental problem with the State's argument is that the trial court never made any such findings

It is worth noting that the State – which quotes liberally from the trial record when it serves the State's purposes – never sets out the actual text of the trial court's ruling In that ruling, the trial court explicitly identified the legal standard it was using, and provided the following explanation (such as it is)

> The issue is whether or not the prosecutor's justification or the defendant's justification if the issue were flipped is reasonable [¶] Having reviewed the documents of the two jurors that [defense counsel] has marked for identification, namely the questionnaires and request for hardship of both [M C] and Mr Jefferson, hearing [the prosecutor's] justification for discharging them, the Court finds that the *Wheeler* motion will be denied

(EOR 130)[9]

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[9] "EOR" refers to the "Excerpts of Record" filed in the Ninth Circuit

The trial court's statement of the applicable legal standard was manifestly incorrect As this Court has repeatedly instructed "'It does not matter that the prosecutor might have had good reasons, what matters is the real reason they were stricken'" *Johnson v California*, 545 U S at 172, quoting, *Paulino v Castro*, 371 F 3d 1083, 1090 (9th Cir 2004), *see also*, *Purkett v Elem*, 514 U S 765, 769 (1995) [the ultimate issue in *Batson* review is *not* "the reasonableness of the asserted nonracial motive" but "rather the genuineness of the motive"] The trial court addressed the wrong question, and as a result there was simply no pertinent "credibility" finding to which deference would be owed

It is unsurprising that the state trial court made that error, for at the time it was routine for the California courts – trial and appellate – to mistakenly conflate the objective "reasonableness" of a prosecutor's justifications with the question actually required by *Batson*, namely, whether those were the prosecutor's "real reasons" for eliminating minority jurors See, *e g*, *Green v LaMarque* 532 F 3d 1028, 1031 (9th Cir 2008), *Williams v Runnels*, 432 F 3d 1102, 1109 (9th Cir 2006), *Paulino v Castro*, 371 F 3d 1083, 1089-1090 (9th Cir 2004), *McClain v Prunty*, 217 F 3d 1209, 1223 (9th Cir 2000), *Love v Yates*, 586 F Supp 2d 1155, 1176-1177 (N D Cal 2008), *Patterson v Alameida*, 2008 U S Dist LEXIS 43749, 33-34 (E D Cal June 3, 2008), *Cook v Lamarque*, 2007 U S Dist LEXIS 81061, 10-12 (E D Cal Oct 31, 2007) That changed (for the most part, anyway) in 2003, when this Court's opinion in *Johnson v California* made the error pellucid [10]

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[10]Despite the varying dates on which they were resolved on federal habeas, all of the cited cases were tried and heard on appeal in the California courts prior to the filing of this Court's (continued)

The instant case, however, was different in one respect Although it was tried (and the wrong *Batson* standard was applied) prior to *Johnson v California*, it was considered by the California Court of Appeal after the *Johnson* opinion was issued Rather than acknowledge the trial court's error, however, the California appellate court responded by labeling daylight nighttime According to the state appellate court "The trial court properly considered the reasonableness of the prosecutor's explanations in assessing credibility, and the court's use of the word 'reasonable' in rendering its ruling does not demonstrate a misapprehension of the proper legal standard "[11] (EOR 45)

The problem is that the trial court did not just "use the word 'reasonable '" It explicitly stated that "*[t]he issue is whether or not the prosecutor's justification is reasonable* " What demonstrates "a misapprehension of the proper legal standard" is that the trial court flatly misstated the proper legal standard [12] As the Ninth Circuit correctly

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[10](continued)
opinion in *Johnson*

[11]It bears note that the author of the state appellate opinion denying the *Batson* claim in the instant case -- Justice Patricia Sepulveda -- was the same jurist who, as a trial judge, had presided over the trial in *Johnson* (See, App 114, and *People v Johnson*, 30 Cal 4th 1302, 71 P 3d 270, *rev'd sub nom Johnson v California*, 545 U S 162) It was her denial of Mr Johnson's *Batson* motion (and her apparent application of the wrong legal standard) that ultimately led to the reversal by this Court

[12]The State's petition acknowledges this problem, albeit in a backhanded fashion, by pointedly noting the trial judge's comment regarding "the right of both parties to exercise peremptory challenges of jurors they honestly feel could not be fair and impartial to their position or have concerns about it " (EOR 130, ll 1-4, see Pet at 5) What the State emphasizes (indeed, the only word from the trial judge that it actually quotes) is the adverb "honestly," which the State would like to pretend was the pivot point of the trial court's (continued)

concluded, to the extent that the state appellate court's contrary view could be taken as a finding of fact, it is an unreasonable one in light of the state court record, and merits no deference *See*, 28 U S C §2254(d)(2)

The State relies heavily on *Rice v Collins*, 546 U S 333 (2006), in which this Court reversed a decision to grant habeas relief in a *Batson* case because the Ninth Circuit had failed to afford proper deference to the state trial court's credibility findings regarding that prosecutor's justifications The lack of any actual credibility finding by the trial court in the instant case is enough, in itself, to render *Rice* inapposite [13]

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[12](continued)
decision But what amounts to a passing comment by the trial court cannot supersede its clear and specific articulation of the standard that it actually applied – which was *not* that it found the prosecutor's justifications "honest," but just that they were "reasonable " Any possible doubt in this regard is dispelled by the sentence that immediately follows the one referred to by the State (and quoted earlier in this note) "This Court is not here to second guess the *reasonable* decisions that are made " (EOR 130, ll 4-6 [emphasis supplied]) It is clear that the trial judge – following the lead of the higher California courts during that time period – believed that his job, in attempting to ascertain the prosecutor's intent, went only so far as to determine whether the stated justifications were objectively "reasonable "

[13]The State also seems to misapprehend the significance of *Rice v Collins* Despite what the State appears to argue, *Rice* does not stand for the proposition that the federal courts must always accede to state trial court credibility findings in *Batson* cases Rather, this Court's other decisions have made it absolutely clear that even the most explicit of such credibility determinations can constitute "an unreasonable determination of the facts" within the meaning of § 2254(d)(2) *See, e g , Miller-El v Dretke*, 545 U S at 236, 266 [holding prosecutor's jury challenges invidious despite trial court finding that justifications were "completely credible' and 'sufficient '"] As the Court has repeatedly made clear in precisely the same context "'Deference does not by definition preclude relief '" *Id* at 240, quoting, *Miller-El v Cockrell*, 537 U S 322, 340 (2003) There is no assertion that, in the instant case, the Ninth Circuit made the specific errors of reasoning that infected its opinion in *Rice* (*e g* , rejecting the prosecutor's explanation that the challenged juror was young and without community roots) All that remains is the State's disagreement with *how* the Ninth Circuit went about applying the (correct) legal standard, even if the State's criticisms were valid (and
(continued)

2 In the State's formulation, repeated throughout its petition, the Ninth Circuit "disregarded the trial court's factual finding that the prosecutor's reasons were genuine, in favor of its own de novo comparative juror analysis" (Pet i ["Question Presented"], see also, *id* at 9, 10, 11, 12-15, 18, 29 [complaining of "[t]he Ninth Circuit's isolation of comparative juror analysis as the primary, if not exclusive means of determining the prosecutor's credibility "]) We have already seen that the first part was wrong – there was no such factual finding It is even clearer that the second half of the formulation is inaccurate The Ninth Circuit evaluation of the prosecutor's reasons in this case did not consist "primarily" – much less "exclusively" – of comparative juror analysis

As traced above, the Ninth Circuit began its assessment with the prosecutor's principal reason for striking M C (and the only justification discussed at any length in the State's petition) – his purported concern that the prospective juror might have been biased by the attempted molestation of her daughter The Court of Appeals found the justification "wholly unpersuasive for several reasons" (App 19) The principal basis for that conclusion was simply that, as a justification for striking M C , the explanation made no sense, for any bias on M C 's part as a result of the molestation would have been in favor of the *prosecution* (App 19-21) While the conclusion, that the justification was pretextual, was *also* supported by a comparison with the prosecutor's treatment of other, non-African-American jurors (*id* at 21-25), it was similarly bolstered by the prosecutor's "failure to clear

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[13](continued)
they are not), its petition presents nothing more than a request for "simple error correction"

up any lingering doubts about M C 's objectivity by asking follow-up questions "[14] (App 25-26, citing, *Miller-El v Dretke*, 545 U S at 244)

To the same effect, the Ninth Circuit rejected the prosecutor's second justification (that M C purportedly was overly concerned with the professionalism of the attorneys) primarily because it failed on its own terms "M C simply expressed reasonable expectations concerning attorney behavior She did not say, as the prosecutor stated during the *Wheeler/Batson* hearing, that unprofessional conduct or aggressive cross-examination would 'affect her judgment '" Thus, not only was the justification betrayed by logic, but it also involved a second telling factor, that this Court has flagged in *Batson* cases "The prosecutor's mischaracterization of M C 's testimony [was itself] evidence of discriminatory pretext " (App 31, citing, *Miller-El v Dretke*, 545 U S at 244) Once again, comparative juror analysis was employed – but only to seal the conclusion formed by even more direct inferences, namely, that the prosecutor's justification was pretextual

The Ninth Circuit followed the same analytical process with regard to the prosecutor's final justification, regarding M C 's religious beliefs It began by noting "[t]hat the other reasons were pretextual raises an inference that this final rationale is also a make-weight " (App 33, relying upon, *Snyder v Louisiana*, 552 U S at 485) The Court of Appeal next observed that, once again, the prosecutor had mischaracterized M C 's testimony on *voir*

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[14]The Court of Appeal likewise addressed a sort of alternate justification raised in the State's briefs below – that M C 's "involvement in the system" as a result of the molestation might have soured her on law enforcement – by first pointing out that the *voir dire* record itself did not support such an inference, and only then noting that a comparative analysis also put the lie to it (App 26-27)

dire, and that, once again, the prosecutor had failed even to question the prospective juror regarding the subject matter of his purported concern As the Ninth Circuit discussed, these are both reasons cited by this Court for inferring that a prosecutor's justification is pretextual (App 34, discussing, *Miller-El v Dretke*, 545 U S at 244) Only then did the court embark on a comparative juror analysis, which it found to confirm the finding of pretext which had already been indicated (App 34-36)

In short, if the Ninth Circuit ever (as the State claims) relied upon "comparative juror analysis as the primary, if not exclusive means of determining the prosecutor's credibility" it did so in some other case – not the case in which the State now seeks *certiorari*

3 The Ninth Circuit thus merely performed the task that *Batson* and its progeny require of all courts when a *prima facie* case of discrimination in jury selection has been made out It examined the "'totality of the relevant facts' to decide 'whether counsel's race-neutral explanation for a peremptory challenge should be believed '" App 10, quoting *Hernandez v New York*, 500 U S 352, 365 (1991), see also, *Batson*, 476 U S at 93 ["In deciding if the defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available "] It did so using precisely the same tools prescribed for the task – and utilized – by this Court's opinions in *Miller-El v Dretke* and *Snyder v Louisiana* And the Ninth Circuit reached the same conclusion as this Court reached in *Miller-El* – namely that the state courts' decisions were based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," within the meaning of 28 U S C § 2254(d)(2) *Miller-El v*

Dretke, 545 U S at 240, 266

This leads to two significant points One is that, if the Ninth Circuit closely followed this Court's own methodology (which it did), but came to the wrong result (which it did not, but we will pretend for a moment that it did), there is absolutely nothing to the State's petition but a bare request for error correction As already reviewed, "simple error correction" is assuredly not a reason for this Court to expend its limited resources on granting *certiorari*

The other point is that, just as in *Miller-El*, the Ninth Circuit's analysis in this case was based on § 2254(d)(2) – rather than the alternative provision of § 2254(d)(1) As this Court observed in the case most cited by the State "The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law" *Rice v Collins*, 546 U S at 342, see *Wiggins v Smith*, 539 U S 510, 529 (2003) [because the state courts' decision was, *inter alia*, an "unreasonable determination of the facts," the other "requirements of 2254(d) pose no bar to granting habeas relief "] see generally, 2 Hertz & Leibman, *Federal Habeas Corpus Practice & Procedure*, §32 4 & n 10 (5th ed 2005)

That in turn means that the test set forth in the alternative provision – *i e* , whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" – was not at issue in this case *See*, *Rice v Collins*, 546 U S at 342 [declining to assess whether the §2254(d)(1) standard was met when the only determination made by the Ninth Circuit was that the state courts' *Batson* decision was "based on an unreasonable determination of the facts" under §2254(d)(2)] Nor did the Ninth Circuit

purport to make any ruling that regard [15]

Yet the analytical heart of the State's petition is its argument that the Ninth Circuit erroneously adopted a rule permitting federal courts to disregard trial court credibility findings if the state court failed to employ a comparative analysis in *Batson* cases – erroneous (the State argues) because comparative juror analysis was not "clearly established Federal law" when this case was tried (Pet 21-26) Not only was there no articulation of any such rule in this case, but no part of it – not the business about "disregarding credibility findings" nor the question of whether comparative juror analysis was required by "clearly established Federal law"– was even discussed, for no part of it was necessary to the Ninth Circuit's mode of inquiry or ultimate conclusion The heart of the State's argument is thus made entirely of straw

4 Perhaps the most dismaying thing about the State having created a fictional Ninth Circuit ruling, solely in order to demolish it, is that if the Ninth Circuit *had* so ruled it would have been correct The fight the State has picked with a straw man is one it could not win

Contrary to what the State seems to assume, "comparative juror analysis" is not some independent doctrine of federal constitutional law, recently concocted and imposed upon the states by this Court's decisions in *Miller-El*, *Johnson*, and *Snyder* Rather, as the State's supreme court itself (all too) recently acknowledged,

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[15]Nonetheless, as will be discussed presently, the state courts' decision was indeed "an unreasonable application of clearly established federal law" within the meaning of 2254(d)(1) – in addition to being an "unreasonable determination of the facts in light of the evidence presented," within the meaning of 2254(d)(2)

> " those cases stand for the unremarkable principle that reviewing courts must consider all evidence bearing on the trial court's factual finding regarding discriminatory intent Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at *Wheeler/Batson*'s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons In those circumstances, comparative juror analysis must be performed on appeal even when such an analysis was not conducted below "

People v Lenix, 44 Cal 4th at 607

Again, this Court has consistently taught that *Batson* requires courts to examine the "*totality* of the relevant evidence" when assessing colorable claims of discrimination against African Americans and other minorities in the selection of juries The stubborn refusal of the California courts in this case [16] even to look at obviously pertinent facts regarding the comparative treatment of African-Americans and other, similarly situated, jurors was by definition an "unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States " See, *Williams v Taylor*, 529 U S 362, 397-98 (2000) [state court's failure to "evaluate the totality of the available evidence" in determining the existence, *vel non*, of constitutional error was an "unreasonable application of clearly established Federal law], *id* at 415 (O'Connor, J , concurring)[same], see also, *Wiggins v Smith*, 539 U S at 527-28 [state court's assumption, made without reviewing all pertinent evidence, that counsel conducted adequate investigation, was "objectively unreasonable "]

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[16] And not just in this case as will be discussed presently. the California courts' animosity toward "comparative juror analysis," and their resulting blinkered approach to assessing *Batson* claims, was the rule rather than the exception prior to the state supreme court's 2008 *Lenix* decision

"When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied A federal court must then resolve the claim without the deference AEDPA otherwise requires" *Panetti v Quarterman*, 551 U S 930, 953 (2007), citing *Wiggins v Smith, supra* Because the state courts in this case failed to examine all of the pertinent record evidence in evaluating the *Batson* claim – a failure that constituted an "unreasonable application of federal law" – the Ninth Circuit was both empowered and obligated to examine the claim *de novo*

In short, not only the Ninth Circuit's treatment of the *Batson* claim in this case was correct under the approach actually taken by that court, it would also have been correct under the approach falsely ascribed to it by the State

5 With its resistance to the use of "comparative juror analysis" having been undercut by the decision of its own supreme court in *People v Lenix*, the State retreats to a more nuanced (or at least more complicated) argument It asserts that the Ninth Circuit erred in this and other *Batson* cases by failing to respect an established state procedural bar on the use of "comparative juror analysis for the first time on appeal" (Pet at 22-25) This is perhaps the least tenable of all of the assertions made by the State in a petition full of problematic arguments

To the extent that the State's assertion is just a variation on its theme about the Ninth Circuit s purported misinterpretation of the "clearly established Federal law" language in §2254(d)(1), it is irrelevant for the reasons already discussed – namely, that the Ninth Circuit

neither sought nor need to interpret that language, and certainly did not misinterpret it But the assertion fares no better if we give it a more coherent shape than the State's petition provides, and take it as an argument to the effect that Respondent procedurally defaulted on the right to comparative juror analysis by not seeking it in the trial court – a default which thus barred the federal courts from conducting such an analysis See, *Coleman v Thompson*, 501 U S 722, 729 (1991) Even that best version of the State's argument fails

The State's assertion depends on several predicates, including, (a) that comparative juror analysis was neither raised by Respondent at trial nor conducted by the trial court, (b) that, at the time of Respondent's trial, there was a recognized state procedural rule requiring that comparative analysis be requested at trial or forever waived, and (c) that the rule was "'firmly established and regularly followed'" at the time of the trial *Ford v Georgia*, 498 U S 411, 424 (1991) [citation omitted] Not one of those predicates was satisfied in the instant case

a Contrary to what the State asserts (and what the state appellate opinion suggests) comparative juror analysis was *not* "raised for the first time on appeal " Rather, the record plainly demonstrates that Respondent's counsel urged such analysis in support of his *Batson* claim in the state trial court

In responding to the justifications offered by the prosecutor for challenging potential juror M C , counsel asked the trial court to compare her to other (seated) jurors He pointed out that at least one other juror had (like Ms C) stated that she expected the attorneys to

conduct themselves in a respectful and professional manner,[17] and that other jurors had made similar statements about the effect that their religious beliefs might have on their deliberations.[18] Trial counsel thus rebutted the prosecutor's rationales for excusing Ms. C. by showing that the "other jurors" to whom he made comparison were permitted to serve without challenge.

Similarly, trial counsel pointed out that the "light-hearted remark" which the prosecutor seized upon as an excuse for eliminating Mr. Jefferson was similar to those made by other jurors. (EOR 124), and counsel specifically compared Mr. Jefferson's interaction with the prosecutor to his own interaction with another, seated juror. (EOR 124-25).

In short, the notion that comparative juror analysis was urged "for the first time on appeal" in this case is a canard. Even the state appellate court acknowledged, in a footnote, that trial counsel had tendered comparisons – but it shrugged them off as being "general references," not a "meaningful showing sufficient for the trial court," and in any event unrelated to the comparisons that were urged on appeal. (App. 110-11, n. 6).

The state court's opinion did not cite any authority for the proposition that what

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[17] "As to Ms. Combs, her statement about wanting the attorneys to be professional ... she answered that question, I thought, very well. And as *we heard from another juror today, on television you see attorneys screaming at each other and both of them told us their thoughts that they don't really want to see that happening*. You know, they want to see a professional – they want to see the attorneys act like professionals. She was thoughtful, and I would have expected really the same answer from everybody else, *actually this woman over here gave pretty much the same answer as Ms. Combs*." (EOR 121-22 [emphasis supplied])

[18] "As to her religious and spiritual beliefs in passing judgment, that's a non-issue also. *She gave a very similar answer to everybody else that was not challenged* by Mr. Wagstaffe." (EOR 122-23 [emphasis supplied])

counsel urged was something less or other than "comparative juror analysis " In seven years of post-trial litigation, counsel for the State has not come up with a single precedent in support of that pronouncement In fact, there is not a shred of support, in state or federal decisions, in the record, in logic or in common sense for the conclusion that there was anything inadequate about the comparison invited by trial counsel's remarks On the contrary, the courts have found far more general statements sufficient to trigger a trial court's duty to engage in comparative analysis *E g , Burks v Borg*, 27 F 3d 1424, 1428 (9th Cir 1994), *cert denied,* 513 U S 1095 (1995) [accepting the California Attorney General's contention that comparative juror analysis was adequately triggered when "defense counsel argued that the prosecution's reasons for peremptory strikes of Blacks and Hispanics were not credible when 'compared and contrasted to the non-minority persons with the same problem '"] And no published California case has ever rejected a request for comparative juror analysis on the ground that it was (to quote the state appellate court) "too general " (EOR 47, n 6) Rather, the level of specificity in this case was ample to comport with the very broad standards in California law for preserving issues for appellate review *See, e g , People v Mattson*, 50 Cal 3d 826, 854, 789 P 2d 983 (1990), see generally, *People v Bruner*, 9 Cal 4th 1178, 1183 n 5, 892 P 2d 1277, 1279 n 5 (1995)

To be sure, counsel did not use the words "comparative juror analysis ' It is no wonder he did not, for (as will be reviewed presently), at the time of Appellant's trial, such analysis was at best disfavored – if not completely prohibited – under California precedent

The state appellate court's alternative "reason" for shrugging off the comparisons

made in the trial court – that "the juror comparisons urged on appeal are unrelated to trial counsel's references to the alleged similarities between the responses of seated jurors and challenged jurors" (*ibid*.) – is simply false. The comparisons urged in that court were identical to the ones presented in the federal courts, and the same as those detailed in the panel's opinion. They include all of the comparisons made by trial counsel in his *Batson* argument.

Finally in this regard, the State itself emphasizes that the trial judge undertook his own comparison between an excluded African American venire member and another who was not African American. (Pet. 12.) While Respondent views the remarks cited by the State as being more akin to idle musings than to a "comparative analysis" of any sort, it does not lie for the State to both assert that the trial judge undertook such an analysis and argue that this case involves "comparative juror analysis for the first time on appeal."

b. The supposed state procedural prohibition on "comparative juror analysis for the first time on appeal" was never asserted by the California courts until some two years after Appellant's 2001 trial. The first time the phrase, or anything like it, appeared in a California Supreme Court opinion was in *People v. Johnson*, 30 Cal.4th at 1325, 71 P.3d at 284, *reversed by, Johnson v. California*, 545 U.S. 162. Prior to that, "California caselaw provided that *neither* the court of appeal nor the trial court need 'compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered.'" *Kesser v. Cambra*, 465 F.3d 351, 360, n.3 (9th Cir. 2006) (*en banc*) [emphasis supplied], quoting, *People v. Arias*, 13 Cal.4th 92, 136 n.16, 913 P.2d 980, 1008 n.16 (1996). In fact,

earlier opinions of the California Supreme Court seemed explicitly to discourage – if not outright prohibit – courts at *any* level from conducting comparative juror analysis in *Batson* cases As that court reiterated, the year before Appellant's trial

> "'[W]e have previously rejected a procedure that places an "undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor," noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial '"

People v Box, 23 Cal 4th 1153, 1190, 5 P 3d 130, 154 (2000), quoting, *People v Turner*, 8 Cal 4th 137, 169, 878 P 3d 521, 537 (1994) [19] Indeed in another case from that same era, the California Supreme Court disapproved the use of comparative juror analysis on appeal even when it *had been* implemented in the same case in the trial court *People v Montiel*, 5 Cal 4th 877, 909, 855 P 2d 1277, 1293 (1993)

But then this Court issued *Miller-El v Cockrell*, 537 U S 322, 328 (2003) [*Miller-El*

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[19]In a footnote to its petition, the State cites *People v Box* and a string of other state high court cases as standing for the rule that comparative juror analysis was waived if not raised at trial (Pet 25, n 7) Like much else in the State's petition, that is plainly false In every one of the cases cited by the State that was decided prior to Respondent's trial, the California Supreme Court reasserted its position that it would not engage in comparative jury analysis *under any circumstances* – with nary a reference to the supposed limitation on doing so "for the first time on appeal See, *People v Caitlin*, 26 Cal 4th 81, 119 n 5, 26 P 3d 357, 381 n 5 (2001), *People v Ayala*, 24 Cal 4th 243, 270, 6 P 3d 193, 208 (2000) [holding that appealing defendant was not entitled to jury questionnaires of non-minority jurors, as "this court will not in any event compare the views of those jurors excused by peremptory challenges with those who were not excused on that basis "], *People v Box*, 23 Cal 4th at 1190, 5 P 3d at 154, *People v Ervin*, 22 Cal 4th 48, 76, 990 P 2d 506, 520 (2000) The only exception is *People v Heard*, 31 Cal 4th 946, 971, 75 P 3d 53, 69-70 (2003), which was decided after *People v Johnson* and two years after Respondent's trial – and which ascribed the "not for the first time on appeal" rule to *Johnson* (also decided two years after Respondent's trial)

I], which made clear that comparative juror analysis is a useful and necessary tool for parsing *Batson* claims Recognizing that a prohibition against all comparative juror analysis was clearly an untenable application of *Batson,* as explicated in *Miller-El I,* the state supreme court refashioned its rule into a prohibition against such comparative analysis "for the first time on appeal" – and then pretended that the (revised) rule was exactly what it had been saying all along [20] *People v Johnson*, 30 Cal 4th at 1318-1325, 71 P 3d at 280-83

After the Court reversed *that* decision (*Johnson v California,* 545 U S 162), the state high court finally bowed to the weight of constitutional authority and announced that it would permit California courts to employ comparative analysis "for the first time on appeal" in *Batson* cases *People v Lenix*, 44 Cal 4th at 607

Whatever other lessons are to be drawn from the tortured history of California jurisprudence in this area, one thing is quite clear When Appellant was tried, in 2001, there was no rule requiring him to employ comparative juror analysis in the trial court lest he be

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[20]The state supreme court concluded its review of state caselaw regarding comparative juror analysis as follows "Accordingly, we maintain our long-standing practice When the objecting party presents comparative juror analysis to the trial court, the reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling " *People v Johnson*, 30 Cal 4th at 1324-1325, 71 P 3d at 284, *reversed by, Johnson v California,* 545 U S 162 As explained above, there was nothing "long-standing" about that practice In her dissenting opinion, Justice Joyce Kennard reviewed the state court's *Batson* cases from 1989 through 2001 and observed more frankly that they, "without exception rejected comparative juror analysis None says that the reason for not engaging in comparative juror analysis was that the defendant did not raise the matter at trial, many do not even indicate whether the defendant urged comparative juror analysis in support of the motion in the trial court " *People v Johnson*, 30 Cal 4th at 1331, 71 P 3d at 289 (Kennard, J , dissenting) [citations omitted]

barred from asserting that analysis in subsequent proceedings Thus, even if the State were correct in arguing that federal courts must respect such state procedural rules and defer accordingly, there was no such rule to respect in this case

c The State's argument is, at best, an assertion of a procedural bar it proposes that, under California law, Respondent waived the right to comparative juror analysis of his *Batson* claim in the reviewing courts by (supposedly) not asserting that right, or not asserting it specifically enough, in the trial court Again, for such a bar to have any effect on federal review, it must have been "'firmly established and regularly followed" at the time of the trial *Ford v Georgia*, 498 U S at 424

The rule, however, was not even arguably "firmly established" until the California Supreme Court's 2003 decision in *Johnson*, some two years *after* Petitioner's trial As the Ninth Circuit summarized, such "[n]ovel procedural rules do not bar federal review because petitioners are not put on sufficient notice that they must comply " *King v LaMarque*, 464 F 3d 963, 965-66 (9th Cir 2006), *citing*, *Ford v Georgia*, 498 U S at 423-25

Nor can the State seriously argue that the rule was "consistently applied " The California Supreme Court itself stipulated that it need not be "While *we decline to prohibit the practice outright*, we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate " *People v Johnson*, 30 Cal 4th at 1325 [emphasis supplied], *reversed by Johnson v California*, 545 U S 162 The state court's difficulty envisioning appropriate scenarios soon cleared up In 2005, responding to *Miller-El v Dretke*, the state high court began

"assuming, without deciding," that it was it was required to apply "comparative analysis for the first time on appeal" and did so (without further explanation) in a number of cases *People v Schmeck*, 37 Cal 4th 240, 270-273, 118 P 2d 451, 471 (2005), *People v Zambrano*, 41 Cal 4th 1082, 1109, 163 P 3d 4, 25 (2007), *People v Ledesma*, 39 Cal 4th 641, 669, 140 P 3d 657, 687-88 (2006) The supposed procedural bar against the application of "comparative analysis for the first time on appeal" was not "well-established" at the time of Respondent's trial and it was never "consistently applied " It thus could not preclude the federal courts from applying the mandated constitutional analysis in *Batson* cases arising on habeas corpus review of California criminal judgments

6 Despite the State's many inventions, what is absent from the State's petition is any cogent explanation as to why this case deserves the Court's review on *certiorari* The petition clearly fails to meet any of the Court's traditional criteria The State does not even pretend that the Ninth Circuit's opinion is in conflict with a decision of any of the other federal Courts of Appeals *See*, Supreme Court Rule 10(a) Indeed, the Ninth Circuit's *Batson* jurisprudence – in this case and in general – appears to be completely congruent with that of the other Circuits

Nor is there any colorable suggestion that the Ninth Circuit has "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power " Rule 10(a) On the contrary, the Ninth Circuit's opinion in this case demonstrates a scrupulous effort to apply the precise principles and tools of *Batson* review set out in this Court's several opinions in the area While the State certainly takes

exception with the Ninth Circuit's thinking, and the result reached using those principles and tools, that is obviously not a reason for this Court to expend its resources on retracing the same path

For the same reason, it is manifest that the Ninth Circuit did not decide some new question of federal law that requires this Court's attention or that conflicts with this Court's precedent *See*, Supreme Court Rule 10(c) The Ninth Circuit simply examined the state court's resolution of a *Batson* claim under the standard set out in §2254(d)(2), just as this Court did in *Miller-El v Dretke*, and it used the same analytical methods employed by the Court in *Miller-El* and again in *Snyder*

Nor can the State honestly claim that review is required in order to resolve a conflict between the federal and state courts *See*, Supreme Court Rule 10(a) The supposedly novel rule that the State accuses the Ninth Circuit of adopting – that comparative juror analysis should be utilized by courts reviewing *Batson* cases, even if such an analysis was not sought in the trial court – is now an accepted principle in the California courts *People v Lenix*, 44 Cal 4th at 607, see Pet 24, n 6

The State protests that "many more final convictions" will be "at risk" if the Ninth Circuit continues to disregard state court "credibility findings" in favor of employing "comparative juror analysis as the primary if not exclusive means of determining the prosecutor's credibility" in *Batson* cases If the Ninth Circuit has committed those purported sins, it has done so in some other case No state court credibility findings were disregarded here, and "comparative juror analysis" was neither the exclusive nor even the primary tool

utilized by the Court of Appeals As for the "many more final convictions " the few pending cases actually cited by the State in fact did not involve the rule of law ascribed to them by the State (Please see note 20, *ante*, discussing Pet 25 & n 7)

It is the nature of federal habeas corpus review that "final" state criminal convictions are regularly "at risk" – if that means they are subject to review under specified standards, and subject to being vacated if they offend the United States Constitution The State has not begun to demonstrate the existence of any unsettled question of law, or any error in the Ninth Circuit's interpretation of the law or method of analysis in this case, of sufficient scope or magnitude as to merit the expenditure of the Court's limited time and resources in review [21] Neither the fact that the State believes the Ninth Circuit has gone off track in other *Batson* cases, nor the fact that it believes the Ninth Circuit got the result wrong in this case, presents a cognizable basis for a grant of *certiorari*

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[21] Respondent wishes to emphasize that he believes the Ninth Circuit's opinion was correct in its analysis as well as its result, and that the State's criticisms of the Court of Appeal's "factual conclusions ' are based on a tendentious, often misleading, and at times false description of the record evidence Moreover, several of the State's arguments in this regard were never presented to the Ninth Circuit, either in the regular course of appellate briefing or in its Petition for Rehearing This is not the appropriate context – nor is there sufficient time or space – to reargue the underlying appeal from scratch

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied

Dated February 24, 2010

Respectfully submitted,

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No. 09-894

SUPREME COURT, U.S.
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In the Supreme Court of the United States

MATTHEW CATE, DIRECTOR OF CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *Petitioner,*

v.

MOHAMMED HAROON ALI, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondent advances six reasons why he opposes review of the Ninth Circuit's decision overturning his California judgment of conviction for first degree murder. None of his arguments overcomes the state's substantial showing of fundamental error by the Ninth Circuit, or of the clear need for a definitive resolution by the Court of the issue under *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

1. Respondent contends the state trial judge never made a factual finding that the prosecutor's reasons for exercising peremptory challenges against two black jurors were genuine. Quoting two sentences from the transcript of the two-day *Batson* hearing, respondent asserts that the trial court only found that the prosecutor's reasons for the challenges were "reasonable." Brief in Opposition to Petition for Writ of Certiorari (Opposition) at 14-17.

Respondent is incorrect. The trial court clearly made the appropriate credibility finding at the *Batson* hearing. The court denied the *Batson* motion after conducting a lengthy and probing colloquy with the prosecutor and defense counsel. It also reviewed the two jurors' questionnaires and hardship excuses. It also obtained and reviewed a transcript of the prosecutor's voir dire of one of the jurors. During the colloquy at the hearing, the prosecutor said, "Your Honor, whether my reaction to the comment from the juror and my assessment of what he felt about decisions versus semantics, whether I'm wrong or right on that doesn't matter, as long as that is the basis for my decision, whether it makes sense or not. The question is, *[a]m I being candid with the Court in saying those are my decisions*? That's what the decision is." SER 801 (emphasis added). The trial

court also stated in denying the *Batson* motion, "The Court is also aware of the right of both parties to exercise peremptory challenges of *jurors they honestly feel they could not be fair and impartial* to their position or have concerns about." SER 812 (emphasis added). The court plainly understood that its task at the third step of the *Batson* inquiry was to determine "the persuasiveness of the justification" proffered by the prosecutor. *Purkett* v. *Elem*, 514 U.S. 765, 768 (1995) (per curiam). Equally plainly, the trial court believed that the prosecutor's reasons were genuine. See *LaVallee* v. *Delle Rose*, 410 U.S. 690, 692 (1973) (per curiam) (trial court's denial of relief after hearing testimony amounted to credibility finding); *Marshall* v. *Lonberger*, 459 U.S. 422, 433 (1983) (same).

The California Court of Appeal pointed out when it rejected respondent's argument on direct appeal that this Court has used identical language to describe the required inquiry. Pet. App. 108. In *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), the Court observed that "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; *by how reasonable, or how improbable, the explanations are*; and by whether the proffered rationale has some basis in accepted trial strategy." *Id.* at 339 (emphasis added).

In light of this Court's own employment of language very similar to that employed by the California trial judge, the state appellate court correctly held that "the trial court's use of the word 'reasonable' in rendering its ruling does not demonstrate a misapprehension of the proper legal standard." Pet. App. 109. Even the Ninth Circuit did not find that the trial court used the wrong

standard or failed to make a credibility finding by ruling that the prosecutor's justifications were reasonable.

Since the trial court's use of the word "reasonable" is not error in this context, respondent mistakenly indicts California courts for routinely employing the term as an allegedly incorrect legal standard in assessing the prosecutor's credibility. Opposition at 15-16. Moreover, respondent conflates this step-three *Batson* inquiry with a different question, i.e., whether the state courts use the correct standard to determine whether the defense has established a prima facie case of discrimination at the step-one *Batson* inquiry. See *Johnson* v. *California*, 545 U.S. 162 (2005). Cases like *Johnson* are simply inapposite in the present context.

2. Respondent disputes petitioner's assertions that the Ninth Circuit disregarded the state trial court's credibility finding, relied "primarily" on its own comparative juror analysis, and concluded that the prosecutor's reasons for the peremptory challenges were pretextual. He contends the Ninth Circuit first evaluated the prosecutor's justifications on their face, and then compared those justifications to other jurors who were not challenged. Opposition at 18-20. This is a distinction without a difference.

It cannot be denied that the Ninth Circuit relied heavily—and primarily—on comparative juror analysis in finding a *Batson* violation. See Pet. App. 3, 8, 9, 10, 12, 13, 14, 18, 19, 21-25, 27, 28, 31, 34-36, 40. The circuit court's holding in the first paragraph of the opinion states that "a comparative juror analysis, in combination with other facts in the record, demonstrates that the prosecutor's purported race-neutral reasons for striking at least one of the jurors were pretexts for racial discrimination." Pet. App. 3. To the extent the Ninth Circuit also parsed

the prosecutor's reasons to draw its own conclusions about the prosecutor's sincerity, respondent proves the state's point that the Ninth Circuit ignored the trial judge's credibility finding. The Ninth Circuit failed even to discuss, much less to defer, to the trial court's finding (except in one instance when it distorted the record in a manner supporting its conclusion). See Petition for Writ of Certiorari at 15 n. 2. Without the tether of deference, the Ninth Circuit repeatedly drew antagonistic conclusions about the prosecutor's stated reasons. It made no difference to its analysis or its conclusion that the trial judge had accepted those reasons based on his first-hand observations of the prosecutor's demeanor. This is fundamental error. See *Snyder* v. *Louisiana*, 128 S. Ct. 1203, 1208 (2008) ("We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province, and we have stated that in the absence of exceptional circumstances, we would defer to the trial court.") (citations and internal quotations omitted); *Rice* v. *Collins*, 546 U.S. 333 (2006) (Ninth Circuit's reliance on "debatable inferences" to set aside state court's conclusion does not satisfy requirements for granting writ under 28 U.S.C. § 2254(d)).

Respondent also asserts that the Ninth Circuit simply employed an analytical tool from *Miller-El* v. *Dretke*, 545 U.S. 231, 244 (2005), which states that the failure to ask follow-up questions can suggest a pretextual reason for a peremptory challenge. Opposition at 19. However, as we stated in the petition, the Ninth Circuit's reliance on that factor is based on an erroneous reading of the record. The Ninth Circuit claimed, "After the trial court finished asking M.C. about the molestation incident, including questions about how the incident might

affect her objectivity, the court provided the prosecution with an opportunity to ask questions of his own. He did not do so." Pet. App. 25. The Ninth Circuit believed this omission indicated that the prosecutor's "alleged concern with her objectivity was a make-weight." Pet. App. 26. In fact, the prosecutor *did* subsequently question M.C. about whether she thought her prior experience with the criminal justice system would affect her decision-making process—and she again equivocated, which was the basis for the prosecutor's concern. SER 455. The Ninth Circuit's mischaracterization of the record does not support respondent's assertion that it "merely performed the task that *Batson* and its progeny require of all courts." See Opposition at 20.

3. Respondent argues that because the Ninth Circuit stated it was analyzing this case under 28 U.S.C. § 2254(d)(2), the question whether it was entitled to use comparative juror analysis under 28 U.S.C. § 2254(d)(1) "was not at issue in this case." Opposition at 20-22.

However, whether the state court's decision regarding the third step of the *Batson* inquiry was based on an unreasonable determination of the facts under § 2254(d)(2) must be resolved under this Court's clearly established law directing how to evaluate the claim. *Thaler* v. *Haynes*, 175 L. Ed. 2d 1003, 1007 (Feb. 22, 2010) (court of appeals erroneously rejected credibility finding because there was no clearly established law holding that a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalled that conduct). As respondent points out, the Court has set forth various factors to be considered in reviewing the factual assessment of the prosecutor's credibility, including whether the prosecutor asked follow-up

questions, *Miller-El II*, 545 U.S. at 244, and whether the prosecutor's explanations were reasonable and had some basis in accepted trial strategy, *Miller-El I*, 537 U.S. at 339. However, as the petition explains, the Court has not specifically held that comparative juror analysis is required on habeas review of a step-three *Batson* claim, because the cases discussing that analysis arose in states that did not object to that factor. See Petition for Writ of Certiorari at 22-24. We have and do object.

Respondent also contends the issue of whether comparative juror analysis constitutes "clearly established" Supreme Court law under § 2254(d)(1) is not discussed in the Ninth Circuit's opinion, and that it was not necessary to the court of appeals' "mode of inquiry or ultimate conclusion." Opposition at 22. Respondent's view is unsupportable. The state of California has consistently objected to the use of comparative juror analysis in *Batson* cases on federal habeas review, as it did here. The Ninth Circuit responded in this case by citing *Kesser* v. *Cambra*, 465 F.3d 351 (9th Cir. 2006) (en banc), where the court decided that issue against the state. Pet. App. 14; see *Kesser*, 465 F.3d at 360-361. That the Ninth Circuit resolved the issue in an earlier case does not shield its subsequent reliance on circuit precedent from this Court's review. See *Hedgpeth* v. *Pulido*, 129 S. Ct. 530, 531 (2008) (per curiam) (reversing Ninth Circuit holding that was based on earlier circuit law). In this case, the Ninth Circuit not only utilized comparative juror analysis as an essential element of its conclusion, it presupposed that analysis was clearly established and constitutionally compelled.

4. Respondent argues that comparative juror analysis is not a discrete legal doctrine that needs to be clearly established by this Court in order to apply

to state cases on federal habeas review. He further appears to contend that comparative juror analysis was clearly established in *Batson* itself. He notes that *Batson* required courts to examine the "totality of the relevant evidence" when assessing claims of discrimination in peremptory challenges. Opposition at 22-24.

Unlike respondent, even the Ninth Circuit did not conceive of comparative juror analysis as a free-standing tool to be invoked on federal habeas review in its discretion. It deemed the analysis to be compulsory, because, allegedly, this Court clearly established that rule in *Miller-El II*, not *Batson*. *Kesser* v. *Cambra*, 465 F.3d at 360. Despite respondent's afterthought efforts to replant the revisionist roots of the court of appeals' comparative juror analysis in deeper soil, its bloom is still off. His argument is refuted by *Thaler* v. *Haynes*, 175 L. Ed. 2d 1003, which respondent has not addressed, although his opposition postdated that decision. The Court held in *Haynes* that the specific question of whether a judge must personally observe and recall a juror's demeanor-based explanation must be clearly established before it can be the basis of federal habeas relief. *Id.* at 1007-08. The Court also rejected the notion that *Batson* clearly established such a rule: *Batson* does require a judge to "undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," but nothing in that "general requirement" clearly established the demeanor-recollection rule on which the court of appeals' decision rested. *Id.* at 1007. Likewise, a rule that the prosecutor's reasons for a peremptory challenge have to satisfy comparative juror analysis must be clearly established before it can support a grant of the writ by a federal habeas court. And a comparative juror analysis rule like the Ninth

Circuit's is even less apparent in *Batson's* general language than the demeanor-recollection rule. See also *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004) (no clearly established law requiring consideration of suspect's age and experience in determining whether he was in custody, even though *Miranda* required consideration of all objective circumstances generally).

Haynes also observed: "Even if *Snyder* did alter or add to *Batson*'s rule (as the Court of Appeals seems to have concluded), *Snyder* could not have constituted 'clearly established Federal law as determined by' this Court for purposes of respondent's habeas petition because we decided *Snyder* nearly six years after his conviction became final and more than six years after the relevant state-court decision." *Haynes*, 175 L. Ed. 2d at 1008 n. 2. As shown in the petition, even if *Miller-El II* could be viewed as clearly establishing a rule requiring state judges to accept only comparative-juror- analysis-compliant reasons for a peremptory challenge, the Ninth Circuit in *Kesser* unquestionably miscalculated the date such a rule would apply on habeas corpus review. See Petition for Writ of Certiorari at 24-25. The Ninth Circuit backdated the rule to the last reasoned state court decision in *Miller-El*, which was in 1992, thirteen years before this Court issued its merits opinion. See *Kesser* v. *Cambra*, 465 F.3d at 360. *Haynes* makes clear that calculation is wrong. Even under the most favorable construction to respondent, comparative juror analysis was not clearly established until 2005, the year after respondent's case became final.

5. Respondent's backfilling extends to an attempted revision of the state's position in this case. As noted, we contend the Ninth Circuit improperly insists that the prosecutor's reasons must conform to

comparative juror analysis, even though that rule has not been clearly established by this Court. Petition for Writ of Certiorari at 20-26. For reasons not entirely clear, respondent claims petitioner's real argument is that respondent procedurally defaulted on his right to a comparative juror analysis of those reasons on appeal. He then argues no procedural default exists. Opposition at 24-32. As we did not rely on that argument in the petition, it does not warrant further discussion.

In the same vein, respondent misconstrues our citation to capital cases in which the California courts did not undertake comparative juror analysis. In connection with those decisions, the petition points out that judgments involving some of the state's most serious offenders would be in jeopardy if federal courts employ the non-deferential approach to *Batson* claims adopted by the Ninth Circuit in this case. Petition for Writ of Certiorari at 25 n. 7. Respondent cites those cases to dispute the state's approach to comparative juror analysis for purposes of the procedural default doctrine. Opposition at 29 n. 19. As noted, our petition does not assert procedural default.

Respondent also asserts that petitioner's contention is "undercut" by the California Supreme Court's decision in *People* v. *Lenix*, 44 Cal. 4th 602, 187 P.3d 946 (2008). Opposition at 24. In *Lenix* the court held that, after *Miller-El II* and *Snyder*, the California appellate courts should consider comparative juror analysis as "one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." *Id.* at 621, 187 P.3d at 960. *Lenix* shows that the California Supreme believes that if comparative juror analysis is required, that rule arose at the earliest when this Court decided *Miller-*

El II, which supports our assertion that such a rule was not clearly established prior to that time.

6. Finally, respondent contends the petition seeks mere "error correction" of a single case. Opposition at 32-34. This ignores the fact that the Ninth Circuit's approach to federal habeas review of state court *Batson* adjudications reflects a systemic failure to comply with this Court's jurisprudence, necessitating certiorari review under Supreme Court Rule 10(c). The Ninth Circuit has repeatedly refused to accord the requisite deference to the state courts' third-step factual findings, and has insisted that it has the authority to conduct comparative juror analysis de novo. E.g., *Green* v. *Lamarque*, 571 F.3d 902 (9th Cir. 2008); *Kesser* v. *Cambra*, 465 F.3d 351; *Boyd* v. *Newland*, 467 F.3d 1139 (9th Cir. 2006); *Brown* v. *del Papa*, 2006 U.S. App. LEXIS 28148 (9th Cir. 2006); *Currie* v. *Adams*, 2005 U.S. App. LEXIS 19793 (9th Cir. 2005).

Further, in light of the Ninth Circuit's sustained recalcitrance to the mandates of AEDPA, even if the state courts conduct comparative juror analysis for the first time on appeal, there is no guarantee the Ninth Circuit will find those conclusions sufficient to warrant deference. See, e.g., *Doody* v. *Schriro*, 2010 U.S. App. LEXIS 3937, *106-107 (9th Cir. Feb. 25, 2010) (en banc) (Tallman, J., dissenting) (citing seven habeas cases where this Court reversed the Ninth Circuit for failing to give sufficient deference to state courts' conclusions, and lamenting, "we are unrepentant"). Certiorari review is necessary to stem the tide of unwarranted reversals.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted

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